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INDIAN RESERVED WATER RIGHTS

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COMMITTEE ON ENERGY AND NATURAL RESOURCES

UNITED STATES SENATE

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MEMORANDUM OF THE SUBCOMMITTEE CHAIRMAN

To Members of the Senate Committee on Energy and Natural Resources:

In the Western States we are experiencing today what certain commentators terms a "cultural war", a conflict between agricultural, industrial, and Indian interests concerning the use of water. In certain regions of the West, demand for water exceeds the supply.

Over the past 100 years, a complex system of water management and control has emerged in the West, but it is still in a process of definition. State systems of prior appropriation in many areas have fully allocated supplies to non-Indians. Yet, Indians have the judicially established but often unquantified right to enough water to fulfill the purposes of their reservation.

In *Winters* v. *United States* the Supreme Court created an exception to the general rule that waters on public lands are available for appropriation and use by the public. The Court concluded that under the property clause of the Constitution, the withdrawal of lands from the public domain for an Indian reservation included an implied reservation of water rights, with a priority date of the withdrawal. The early establishment of most Indian reservations makes this priority date predate most State-created rights. Moreover, an Indian reserved right is not lost by non-use.

Indian tribes have historically turned to the Federal courts to protect and establish their water rights. However, the translation of these rights into "wet" water for actual Indian economic development has lagged far behind the hopes inspired by the *Winters* decision.

Water rights litigation is expensive, protracted, and complex. Rapid growth in Western States, along with efforts by Indian tribes to develop tribal lands and water rights, have stimulated attempts to devise quicker methods for resolving disputes. Among these proposed solutions are negotiated settlements.

Before any creative solutions can be found to litigation, however, the dialog of the thorny issues and concerns relating to Indian reserved water rights must be expanded to the public at large. There must first be an understanding of the problem before its solution can be found.

The purpose of this workshop on Indian reserved water rights therefore is to allow spirited, healthy public discussions of some of the problems and proposed solutions to Indian reserved water rights in an effort to find areas of agreement. The advantage of the workshop approach is that with no specific bill language before the participants, they are able to address issues and concerns without having to "view with alarm" threatening provisions they feel work against their interests.

It has been said that the challenge of the future lies in finding ways to bring people together to work on common problems. It is my hope that this workshop will germinate the seeds of some constructive solutions to the many issues surrounding Indian reserved water rights. There is value in discussion, even where it points out where there is confusion and disagreement.

While workshops are no magic panacea, they are a useful tool for the Congress to use as we legislate in an era of social, political, and economic change. I commend this committee print to my colleagues for the wealth of wisdom and information it contains.

MALCOLM WALLOP,
Chairman, Subcommittee on
Public Lands and Reserved Water.

AGENDA

WORKSHOP ON INDIAN RESERVED WATER RIGHTS

HELD BY

THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

SUBCOMMITTEE ON PUBLIC LANDS AND RESERVED WATER

June 19, 1984

PROGRAM

9:00 a.m. Opening Remarks by Senator Malcolm Wallop, Chairman Subcommittee on Public Lands and Reserved Water, and Other Members

9:15 a.m. Opening Remarks by Mr. Ralph F. Cox, Chief Operating Officer, Atlantic Richfield Company, representing the Western Regional Council

9:30 a.m. Opening Remarks by Mr. Elmer Savilla, Executive Director, National Tribal Chairman's Association

9:45 a.m. Morning Session, Moderated by Mr. Richard Trudell, American Indian Lawyer Training Program

9:45 a.m. PANEL I: FEDERAL RESPONSIBILITIES TO INDIANS - WATER

Agencies of the Federal government having jurisdictional and trust responsibilities to Indians involving water or water rights will describe the authorities, guidelines, and policies under which they operate.

Panelists:

- Mr. Ken Smith, Assistant Secretary for Indian Affairs, Department of the Interior
- Ms. Mary Walker, Acting Solicitor, Department of Interior
- Mr. Hank Meshorer, Chief, Indian Resources Section, Department of Justice
- Mr. Stuart Jameson, Office of the General Counsel, Department of Agriculture
- Mr. Ron Allen, Assistant Chief Counsel, U.S. Army Corps of Engineers
- Mr. Leigh Price, Indian Coordinator, Environmental Protection Agency
- Mr. Kent Ballentine, Water Quality Standards Office, Environmental Protection Agency
- Mr. Al Havinga, Indian Coordinator, Drinking Water, Environmental Protection Agency
- Mr. William Lynn Engles, Commissioner for Native Americans, Department of Health and Human Services
- Mr. Will Daellenbach, Indian Health Service, Department of Health and Human Services

11:15 a.m. PANEL II: PERSPECTIVES ON OWNERSHIP & CONTROL OF INDIAN RESERVED WATER RIGHTS

The origin, nature, and scope of Indian reserved water rights will be discussed from varying points of view.

Panelists:

Mr. Leonard Atole, President, Jicarilla Apache Tribal Council

Mr. Dana R. Norris, Governor, Gila River Indian Community

Mr. Rodney B. Lewis, General Counsel, Gila River Indian Community

Mr. Craig Bell, Executive Director, Western States Water Council

Mr. Al Schrago, Evans, Kitchel and Jenckes, Phoenix, Arizona

Mr. Hank Meshorer, Chief, Indian Resources Section, Department of Justice

Mr. Paul Baird, Associate Solicitor of Indian Affairs, Department of the Interior

. . . .

12:30 p.m. RECESS

1:30 p.m. Afternoon Session, Moderated by Mr. Jerry Muys, Holland & Hart, Washington, D.C.

1:30 p.m. PANEL III: USE AND MANAGEMENT OF THE RESOURCE

Cases will be made for the management of Indian reserved water rights by Indians, and for water quality protection as part of the Indian reserved water right. Emerging jurisdictional issues will be discussed and opposing views will be heard.

Panelists:

Mr. Tim Wapato, Columbia River Inter Tribal Fish Commission

Mr. Anthony Drennan, Chairman, Colorado River Indian Tribes

Ms. Minerva Jenkins, Chairperson, Ft. Mohave Tribe

Mr. James Steele, Vice Chairman, Confederate Salish & Kootenai of the Flathead Reservation

Mr. Dan Decker, General Counsel, Confederate Salish & Kootenai of the Flathead Reservation

Mr. Steve Reynolds, State Engineer, Santa Fe, New Mexico

Mr. Jon Kyl, Jennnings, Strouss and Salmon, representing the Salt River Project, Phoenix, Arizona

Mr. Hal Furman, Deputy Assistant Secretary for Water and Science, Department of the Interior

Mr. Stuart Shelton, Office of the General Councel, Department of Agriculture

Mr. Ron Allen, Assistant Chief Counsel, U.S. Army Corps of Engineers

Mr. Mike Dwyer, North Dakota Water User's Association

Ms. Harriet Sky, United Sioux Tribes

3:00 p.m. PANEL IV: PROPOSED SOLUTIONS

Cases are made for litigation, negotiation and other creative solutions to Indian establishment of their reserved water rights. Problems with each proposed solution will be discussed.

Panelists:

Mr. John Windy Boy, Chairman, Chippawa Cree Tribe

Mr. Darrell Wright, Water Resource Coordinator, Chippawa Cree

Mr. Daniel C. Boggs, Chairman, Indian Tribal Water Rights Coalition

Mr. Vincenti Pedro, Governor, Pueblo of Laguna

Mr. Roger Jim, Chairman, Yakima Nation

Mr. John Spencer, Director, METRO, Seattle, Washington

Mr. Jim Bush, Evans, Kitchel and Jenckes, Phoenix, Arizona

Mr. Bill Horn, Deputy Undersecretary of the Interior, Department of the Interior

Mr. Hank Meshorer, Chief, Indian Resources Section, Department of Justice

4:15 p.m. WORKSHOP ENDS

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INDIAN RESERVED WATER RIGHTS

TUESDAY, JUNE 19, 1984

WASHINGTON, DC.

The workshop met, pursuant to notice, at 9:10 a.m., in room SD-366, Dirksen Office Building, Hon. Malcolm Wallop presiding.

Present: Senators Wallop and Hecht.

Also present: Terri Sneider, counsel; Thomas B. Williams, professional staff member for the minority; Richard Trudell, American Indian Lawyer Training Program; and Jerry Muys, Holland & Hart.

OPENING STATEMENT OF HON. MALCOLM WALLOP, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator WALLOP. Good morning, ladies and gentlemen. Let me welcome you to the workshop on Indian reserved water rights.

Let me say at the outset that I appreciate the willingness of all the participants to come here, that I have no expectations, and no goal in mind at all except to begin to learn the dimension of the Indian reserved right water problem we all know exists. This session today is for the education of the public, and it is important that we do it in a work format.

There is no legislation in front of us. There is no legislative proposal lurking written somewhere. There is no oversight hearing where the Congress comes and looks at the world as if it were bad children and ought somehow or another to be brought to heel.

This is simply a workshop to begin to draw a boundary around the problem which all of us know exists in some dimension. I doubt if any of us knows the entire dimension of the many problems and issues relating to Indian reserved water rights.

Whether you come to this forum this morning to participate as a panelist, or as a member of the audience, the function you will serve is an important one. It is to educate others, and more importantly to be educated ourselves on the important subject of Indian reserved water rights.

As the demand on limited water resources increases in this country, controversy attaches to Indian water rights as to their quantity and priority. This is particularly true in the West. Because the Indian tribes have a governmental status under American law, they assert both jurisdictional and proprietary rights to water.

In so doing, Indians as everyone else compete with different constituencies in carrying out these two roles. As owners of property interests in water, the Indian people have primarily been establishing their claims to water in competition with non-Indian water users such as agricultural districts, cities, industrial corporations, and States.

The forum for resolution of controversy has largely been the courts. Although the U.S. Congress has recognized the legitimacy of both non-Indian appropriative rights and Indian reserved rights, at present there is no means for reconciling these often conflicting claims. We have a situation in the West where State systems of prior appropriations in many areas have fully allocated supplies to non-Indian people. Yet, under the Winters doctrine, the Indian people have received recognition of entitlement to as much water as they need to fulfill the purposes for which their reservations were created. These rights are usually senior in time to State created rights.

To get some idea of just how much water is involved where Indian reserved water right claims are concerned, let me quote some statistics.

In the 11 States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, some 43 million acres of land are subject to potential tribal reserved water right claims. These claims extend not only to Indian entitlements to water, but to the use and regulation of these water resources as well.

Therefore, the issues before the courts are myriad and not easy to resolve. Water litigation is so complex that cases take from 10 to 30 years for resolution. Only a few judicial decrees actually establish Indian water rights. Many of these decress address only part of a tribe's total water resources.

Because litigation is lengthy, expensive, and difficult, many feel better alternatives are needed. Even when an Indian reserved water right is litigated, litigation cannot ensure funds for water development, nor can litigation address within the context of a stream adjudication the governmental rights of Indian tribes with regard to the Winters doctrine water. Consequently, of the federally recognized tribes, only a few have quantified or expressed an interest in quantifying their water rights.

Due to the growing concern of non-Indian water right holders, State managers of water and industries seek certainty regarding their water ownership or proprietary rights, Equitable alternatives are being sought to litigation. That is why some 3 years ago the Western Regional Council and the Western Governors Association moved to initiate an on-going dialog with leading Indian groups. The hope was that through this dialog, creative solutions might be found.

The purpose of today's workshop is to expand that dialog to the public at large, and to the Indian tribes. Before steps can be taken to end the controversies over Indian water rights in creative ways or even to make litigation a more meaningful solution for those tribes which choose to litigate, there must first be an understanding of the problem.

If Indian water rights are to move from legal abstraction to actual beneficial use, it is imperative that Indian and non-Indian policymakers understand the water needs and priorities of Indian tribes. Conversely, Indian peoples should be sensitive both to the responsibilities of States and the needs of their citizens.

It has been said that the challenge of the future lies in these governments working together to bring about equitable solutions to the present conflict over water. I believe this workshop could be a step in that direction. At its conclusion today, the participants and the audience will have, we hope, a better understanding of the problem. The workshop proceedings when published will be available as an important source document on this subject of critical concern.

It is also my hope that this forum may germinate the seeds of some constructive solutions to the many issues relating to Indian-reserved water rights. The workshop will undoubtedly highlight where there are gaps, confusion, and disagreement over the authority of responsible institutions, or a lack of policy at all levels of government. It will highlight where there is disagreement and why. However, it will also show where Indians and non-Indians agree on these thorny issues. If we concentrated more on the positive instead of the negative, greater progress might be made in resolving these claims.

With that positive note in mind, I would like to explain how the proceedings will be run today before I introduce the next speaker.

This is a workshop and not a formal hearing, as I said at the outset. As such, we are able to have the help of moderators to run the panels today. These moderators, Mr. Richard Trudell on my right, of the Indian Lawyer Training Program, and Mr. Jerry Muys of Holland & Hart, both have expertise in the area of Indian-reserved water rights. It will be their job to encourage dialog among the panelists at the end of the formal presentation and keep the workshop on schedule.

If time permits, questions from the audience of panelists will also be entertained. Today's proceedings will be published in a workshop document which will be available to the public. Time constraints have caused us to ask the panelists to limit their remarks to 5 minutes each. If they summarize, their full statements will be published in their entirety in the workshop record.

I now will ask the panelists to come to the dais to make their presentations. I think it is a less threatening situation to have us all up here talking together than some here talking down to the witness table as it would be in a concept of a hearing. Therefore we will ask the panelists as their panels are called to come up here to the table, to the dais, and make their remarks from here.

Let me now turn to the next speaker, Mr. Ralph Cox, of the Western Regional Council. Before I turn to you, Ralph, I will say that I have another hearing to chair yet this morning. It is in no way an expression of my lack of interest that I leave here. This is a workshop amongst the people who are most concerned about these water issues. It is a chance for your dialog with each other.

I will return from time to time as my schedule in the day permits to just witness these proceedings. However, this is basically your workshop to devise your solutions and your discussions of the dimension of the problem.

Mr. Cox of the Western Regional Council is the chief operating officer of the Atlantic Richfield Co., so let me thank everyone that has come here today and turn the microphone over to Mr. Cox.

STATEMENT OF RALPH F. COX, CHAIRMAN, COMMITTEE ON INDIAN RESERVED WATER RIGHTS, WESTERN REGIONAL COUNCIL

Mr. Cox. Well, thank you, Senator. I have a prepared statement, of course, which I plan to go down point by point, but your opening covered the issues so well that I will try not to be repetitive.

The Western Regional Council might warrant some explanation to the people in the audience. It is a group of 50 businesses in the 8 Rocky Mountain States It is not a trade association in the normal sense of the word because these companies represent mining, construction, transportation, banking, utilities, petroleum companies, communication companies. These companies are both big and small, so we have a Rocky Mountain group that is broad based, although we are all business oriented.

The one point that I think you have made that I am going to emphasize again is that if there is one historically unique thing about the American West, it is the matter of the ownership and the right to water. State constitutions, and the territorial enabling acts, have all vested in the Western States the power and authority to dispose of you might say, or people have rights to all of the water within their boundaries.

You will be hearing testimony today from Indians, non-Indians, Federal and State governments about the Winters doctrine to which you referred, or the reserved water doctrine that says that Congress implicitly reserved an amount of water to fill the purpose for which each Indian reservation was created. The problem that our organization sees is that in the 76 years that has passed since that court decision, Congress has failed to develop any policy or guidelines for determining just how much water would be allocated or quantified to fulfill the purposes for which the Indian reservations were created by either treaty or by statement or by Executive order. The result is we now have in the range of 50 lawsuits making it rather impossible in our opinion for users or potential users or State and Federal administrators to determine just how much water is available for existing uses, but probably more importantly, for future uses which is one of our strong points.

For the past several years our council has become increasingly concerned about the need to solve this problem because not only the amount of water we have, but its official use, the management of this scarce resource.

Now you might ask why is that important in the West? And I think most everyone knows this here, but I would like to remind all of us especially from the West that 90 percent of the nonfuel minerals for this Nation come from the public lands primarily in the West. The same region in the West has a large amount of the low sulfur coal, the oil shale, the uranium, and one of the great potential areas for new oil and gas discoveries is in the Overthrust Belt and other areas all the way from the Canadian border down to Mexico, and our West, as you know, provides also a significant part of the food, fiber, and timber.

It seems to us that the national defense of our country and the future economic stability of our country are tied with the continued economic development of the West, and that is why the Western Regional Council is concerned. To develop these resources and to develop this economic vitality which is so important to our country, we must have and be able to properly utilize the most precious resource of all, which is what we are here today to talk about. That is water.

We believe as the Western Regional Council that our country just cannot afford to leave the resolution of this problem to this series of rather expensive and more importantly time-consuming lawsuits that in our opinion offer little or no predictability as to when the controversy will end, and then even after lawsuits it is not always clear what has been resolved.

Many authorities and some public officials have, including the last two Presidents, also voiced the opinion that litigation is not the best way to solve this problem. The most desirable way, of course, and one which we support, and I think everyone would if it is possible, is to solve it through negotiations.

Now there is some significant problems which is why I think we are here today, to understand that in order to have some negotiated settlements, these problems must at least be recognized, and hopefully we can work together to find some way to mitigate their effects.

First, it is apparent that many of the tribes need some funding which would simply allow them to have enough information, factual information, about the resources, water resources, on their land so that they are in a position to enter negotiations.

Second, we have to realize that in many cases in the West—not in every case, but in many cases there just simply is not surplus water which makes non-Indian users very resistant to giving up what water rights they acquire through these State laws.

Third, there is another problem, that in some cases there is a large number of water claimants, sometimes in the range of 50,000 to 100,000 people, as well as several tribes all competing for the same water, and that makes negotiations very difficult.

In as far as Congress is concerned, we also have to recognize that negotiated settlements are not possible in our opinion without some significant Federal funding, both to provide compensation for non-Indians in many cases whose rights might be displaced by the negotiated settlement as a result of some type of quantification, and also to provide some funding for means of constructing facilities which will allow this water that the Indians gain through the negotiated settlement to be beneficially used.

As you said in your opening remarks, we in the Regional Council have been working what we consider hard over the last 3 years to try to foster these negotiated settlements. We have been working with several of the Indian organizations as well as with the Western Governors Association, and we still hope that there is a reasonable solution to this problem that can be solved through negotiations, but however, if negotiated settlements cannot be achieved through one means or another, our fallback position if you will is that our Nation simply cannot wait for 50 years or more because of this economic need. We have to solve this problem, and if it were necessary to not be able to have a negotiated settlement, then we would suggest a legislative solution.

The Comptroller General in 1978 offered several comments in which he said that the Congress is in the best position to consider all of the competing interests. He said that a national policy to uniformly identify, quantify, and administer reserved rights is desirable, and he also said certain unresolved and disputed areas of the law and their interpretation may require change, and in their final recommendation to Congress which is I think repeating kind of where we are, and I ought to, if adequate progress is not made because of the difficulties in resolving the controversial questions and issues discussed in this report—and I emphasize again that is if adequate progress has not been made—we hope that Congress will consider a legislative solution.

I want to emphasize again that the Western Regional Council prefers negotiated settlements, and we have been working and will continue to work to foster an environment so that that can happen, but if it does not, we would propose a legislative solution.

Thank you very much.

[The prepared statement of Mr. Cox follows:]

Statement
of
Ralph F. Cox

Chairman, Indian Reserved Water Rights Committee
Western Regional Council

Before the
Indian Reserved Water Rights Workshop
of the
Subcommittee on Public Lands and Reserved Water
Committee on Energy and Natural Resources
United State Senate

Washington, D.C.
June 19, 1984

Mr. Chairman, my name is Ralph Cox. I am the Chairman of the Committee on Indian Reserved Water Rights of the Western Regional Council (WRC).

The fifty member companies comprising WRC represent a broad cross-section of interests, including mining, construction, transportation, banking, utilities, petroleum, and communications with major operations in the western United States. (A list of the member companies is attached as Appendix A to my statement.)

If there is one issue that has historically distinguished the American West, it is the matter of the ownership and the right to the use of water. State constitutions and territorial enabling acts typically vested the western states with the power and authority to dispose of all of the water within their boundaries.

Later this morning you will hear testimony from experts representing Indians, non-Indians, and federal and state governments regarding the now famous "Winters" or reserved rights doctrine that says Congress impliedly reserved an amount of water to fulfill the purpose for which an Indian reservation was created.

Unfortunately, in the seventy six years since the Court's decision, Congress has failed to develop any policy or guidelines for determining how much water shall be allocated or quantified to fulfill the purposes of Indian reservations created by treaty, statement, or by executive order.

As a result, there are now more than fifty lawsuits pending making it impossible for users, potential users, state administrators and federal agencies to determine the quantity of water available for existing or new uses.

For the past several years, the Western Regional Council has become increasingly concerned over the undetermined nature of Indian Water Rights and believes there is an urgent need to settle the problem. The controversy is becoming more acute and inhibits the efficient management and use of scarce resources.

In this regard, I would remind you that 90% of our non-fuel minerals come from public lands primarily in the west. This same region contains the bulk of the nation's low sulfur coal, oil shale and uranium and one of the greatest "in shore" potentials for new oil and gas production lies in the overthrust belt extending through Alaska and the western United States from the Canadian border to Mexico. In addition, a very significant part of the nation's food, fibre, and timer originates in the west.

The national defense and the future economic stability of the country are inextricably tied to the continued development and supply of these resources. That development and supply are equally dependent upon the most precious resource of all -- water.

The Western Regional Council believes the nation can ill afford to leave the resolution of this problem to a series of expensive and time-consuming lawsuits that offer little or no predictability of an end to this controversy.

Most authorities and public officials, including the last two Presidents have stated that litigation is not an appropriate method for a resolution of this problem.

The most desirable manner of resolving these disputes is through negotiation -- and WRC supports such an objective. However, there are some significant problems which impede negotiated settlements and all parties need to be aware of these problems and need to minimize these impediments.

First: Many tribes need funding which will allow them to acquire the necessary factual information about water resources on their lands, so they are in a position to enter into negotiations;

Second: In most instances, there is no surplus water which can be used to effect a settlement, and non-Indian users are resistant to giving up water rights perfected under state law;

Third: The sheer number of water claimants -- in some cases as many as 50,000 to 100,000, as well as two or more tribes, makes negotiation extremely difficult; and

Last: Settlements will not be possible without significant federal funding (1) to provide compensation to non-Indians whose rights may be displaced as a result of quantification, and (2) to provide the means for constructing facilities which will enable Indians to beneficially use water allocated to them in a settlement.

Despite the difficulties just mentioned, WRC has conscientiously endeavored over the past two years to work toward an environment that can produce negotiated settlements.

We believe the combined effort of Western Governors, Indian Tribes and the private sector, together with a strong federal commitment, can result in a reasonable solution to this critical problem through negotiation.

If progress on negotiated settlements is not made, then we believe that inefficient litigation will effectively tie up water uses and resource development in the west well into the next century. Rather than delay economic development for such a long time we would recommend that a legislative solution be mandated by Congress.

In a 1978 Report to The Congress, the Comptroller General identified the following factors as supporting a legislative solution to this growing controversy:

(1) "Congress is in the best position to consider all competing interests";

(2) "A national policy to uniformly identify, quantify and administer reserved rights seems desirable"; and

(3) "Certain unresolved and disputed areas of the law and their interpretation may require change".

Such Report contained the following "Recommendation To The Congress":

> "If adequate progress is not being made because of the difficulties in resolving the controversial questions and issues discussed in this report, we hope that the Congress will consider a legislative solution."

We emphasize that we prefer negotiated settlements, but if legislation is required the Western Regional Council has developed a proposed legislative solution.

- Thank You -

Appendix A

Western Regional Council

MEMBER COMPANIES

Amax, Inc., Climax Molybdenum Company
American Express Company
Amoco Production Company
Arizona Public Service Company
Arthur Anderson & Co.
Atlantic Richfield Company
Burlington Northern, Inc.
CH2M Hill
Colorado Interstate Gas Company
Colorado National Bank
Denver and Rio Grande Western Railroad Company
Ernst & Whinney
First Interstate Bank of Nevada
First National Bank in Albuquerque
Gulf Mineral Resources Company
Hecla Mining Company
Homestake Mining Company
Husky Oil Company
Idaho Power Company
Kennecott
Minton & Associates, Inc.
Montana Power Company, The
Morrison-Knudsen Company, Inc.
Mountain Bell
Mountain Fuel Supply Company
Mountain States Mineral Enterprises, Inc.
NERCO, Inc.
Nevada Power Company
Newmont Mining Corporation
Northwest Energy Company
Peat, Marwick, Mitchell & Co.
Phelps Dodge Corporation
Phillips Petroleum Company
Public Service Company of Colorado
Public Service Company of New Mexico
Ranchers Exploration and Development Corporation
Rocky Mountain Energy Company
Sierra Pacific Power Company
Southern Pacific Land Company
Sundt Corp.
Utah Power and Light Company
Valley National Bank of Arizona
Western Energy Company
Westmoreland Coal Company
White River Shale Oil Corporation

Senator WALLOP. Thank you, Ralph. I might just add an observation of my own. It is simply that what has been resolved by the court decree is not necessarily resolved, as you point out, because the judgments are sometimes difficult to interpret, their dimensions sometimes difficult to determine, and when the decision is handed down there is still a legal challenge to the words of man. This is also one of the threats as I see it to a legislative solution. Despite the fact that there are more lawyers in Washington per capita than anywhere else in the world, we have not yet devised a perfect set of words that flies through the courts without some interpretive effort. That, too, is a delay which may ultimately be intolerable, so the best thing that could happen is if there was sufficient common ground in each of these instances for a negotiated solution.

Let me just say that one of the things that concerns me about a judge saying that there should be a national policy—Dick Trudell and I were talking just before the morning's proceedings began—the national policy just won't work unless regional differences are accommodated because water problems in New Mexico and Wyoming are quite different than water problems in upper New York State and Florida, for example.

This is not going to work if we have one policy that Congress sits down and throws a blanket over the country and somehow or another everybody will snuggle down for the long winter's sleep. It doesn't seem to be the way that is going to work. This place has a bizarre lack of understanding of the dimension of the problem to make a statement like that.

I hesitate to criticize the courts and hope that I don't ever have to be in front of the one that I do criticize, but it strikes me that that is just not going to work.

The next remarks are by Mr. Elmer Savilla. He is the executive director of the National Tribal Chairmen's Association, and Elmer, let me personally thank you for your willingness to come and participate in this dialog.

STATEMENT OF ELMER M. SAVILLA, EXECUTIVE DIRECTOR, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION

Mr. SAVILLA. Thank you, Senator. This morning I guess I will start my remarks with, since the gentleman from WRC mentioned negotiations, a word on negotiations.

I recall a statement made by President Kennedy in 1961 on international negotiations. He said we cannot negotiate with those who say what is mine is mine, and what is yours is negotiable.

Many of the tribes have that exact statement in mind when their reserved water rights are established by particular rights, Federal Government rights, and being asked to negotiate part of that away, their water away, many of the tribes feel that that is carrying things a little bit too far.

Now ever since the early Federal/Indian relationships the Federal Government has always encouraged Indian tribes to become farmers, ranchers, and to make better use of the land.

To do so, Indian tribes need water. Indian tribes are being encouraged to attain self-sufficiency by means of economic development, and to do so Indian tribes need water. This self-sufficiency and economic development will mean making a monetary profit if they are to stay in business, and new development means other things, too. It means the development of new housing, employment opportunities, new people coming in to live, infrastructures, community services, all manner of things which require water. Indian-owned power projects need to be developed, water systems, irrigation projects, so it is inevitable that Indians if they lose water now will eventually run out of water for their own particular needs.

Use of water in sufficient quantities is tied to their very survival, and many tribes resent any non-Indians who are attempting to take those water rights away from them now when they are just barely beginning to make some progress.

Today you will hear of similar yet diverse, as you pointed out, problems which Indian tribes from all parts of the country are experiencing in trying to assert their legal water rights and beneficial use of that water, but the truth remains that apart from local or regional problems, the cause and effect of those problems has its roots in the nature of the trustee to do its duty in regard to those Indian water rights. There is no escaping the fact that the United States has allowed itself to be committed to a policy, speaking of national policies, of manifest destiny.

Now that policy is a self-fulfilling prophecy that Indians would somehow disappear by assimilation or economic destruction by the opening up of Indian country to white settlement and the exploitation of Indian resources. That manifest destiny policy requires that in order for the Indians to disappear, development opportunities for tribes must not be readily available. Otherwise Indians would not disappear as prophesied.

Now massive Western non-Indian water projects have benefited by Federal assistance down through the years while Indian tribes have been systematically denied such assistance. They are still to this very day looking for such assistance for developing their own resources.

The deprivation of their water rights by deliberate Federal actions is the most glaring example of the destructiveness of that manifest destiny Federal policy. Now if these charges seem harsh, we only have to review the record which is public in the *Arizona* v. *California* lawsuit. Tribes were systematically and deliberately kept from participating in that lawsuit. Their evidence that was hard collected was not allowed to stand up many times, and in the final Supreme Court argument they were not allowed a complete opportunity to have their attorney present their case.

The decision rendered against the Indians was not in the interest of justice, not in the interest of upholding Indian legal rights or even fairness. In the words of the Supreme Court, the decision was made in the interest of finality just to get rid of it. It was bothersome.

The same thing happened in the *Pyramid Lake Paiute Tribe* water case. Political play came into evidence in that particular case. I have a letter which I will submit if necessary, a letter from Senator Laxalt of Nevada, which was sent to the U.S. Attorney General William French Smith on October 7, 1981, which admits the political situation in the case, and it suggests that the Attorney

General and the Senator were coconspirators in taking the *Pyramid Lake Paiute Tribe's* precious water. That was months before the final decision came down.

Former Interior Secretary James Watt, while professing to recognize the authority of the tribal governments, refused to meet with the tribal leadership to discuss the water issues. Instead he chose the divide and conquer method by arranging for meetings with Indian organizations who were willing to cooperate. In fact, at one meeting in December of 1983 he committed $4.9 million to their combined efforts to encourage Indian tribes to negotiate away their precious water rights.

It is interesting to note, and we are put out about it, to note that the National Tribal Chairman's Association was refused an invitation to that meeting.

Now the conflict of interest which is rampant within the Federal agencies, namely, the Interior Department and the Department of Justice, is one that needs to be addressed. In a case involving the *Yakima Indian Nation* v. *United States*, a memorandum was developed in-house which gave the Secretary the right, the option to decide when he would use his discretion in defending the Indians under that trust. They kept that memorandum from us for over a year. Finally, with congressional pressure that was released, but anyway that memorandum amounts to a kangaroo court decision by the Secretary which allows him to escape his fiduciary duty. I have a copy of that memorandum for you.

Now ever since the passage of the Reclamation Act of 1902, those massive Federal subsidies for non-Indian water projects encouraged the settlement and occupation of new lands which naturally required more non-Indian water, and that is the reason we are here today. I think the Indians are the butt of the non-Indian development out in the West. Through no fault of their own, the Indian tribes find themselves in this life or death struggle.

The GAO, as a matter of fact, the General Accounting Office, and the President's Office in 1978 acknowledged that the Federal Government has led the way in developing the West for non-Indian beneficiaries. Now to most Indian leaders, quantification which is one of the things that the Federal Government is pushing for, quantification means the same as a limitation of their water rights. To most Indian leaders, negotiations means an outright denial of their rights, and to most Indian leaders, both of the above would open the doors to an outright theft of Indian water.

Indian tribes have not had the benefit of massive assistance for water and land development. You can go through any of the reservations in the West and immediately determine where the reservation boundaries end. On one side you will see, for instance, in southern California—I see a member from the Polar Reservation—on one side of the fence you will see lush avocado groves and orange groves, citrus, alfalfa. On the other side of the fence, on the reservation side, you will see brush, undeveloped land. Throughout the West it is that way. You can actually see where the reservation boundaries end, and therefore the evidence is there. The tribes have not had the benefit of that massive help that has been there for the non-Indians.

Now negotiations would seek to balance the competitors for water without regard for consideration of the Federal Government's trust responsibility for the tribes. To date, negotiated agreements have resulted in legislative solutions. The problem with this solution is that these proposals, legislative proposals, start with the unanimous conclusion that any existing law which supports Indian water rights is downright detrimental and downright inconvenient to non-Indians and needs to be changed.

Most Indian leaders condemn this type of anti-Indian solutions. Now what is completely and has been overlooked by the authors of the negotiated agreements is that Indian water is protected completely by the fifth amendment of the U.S. Constitution which calls for proper compensation. Water is the most valuable resource in the West. Nothing can operate without it—people, slurry coal, oil, mining—and yet these negotiated agreements have resulted only in token amounts for that water, so the National Tribal Chairman's Association cannot in good conscience endorse the negotiations process as it is practiced now. It is not an acceptable alternative to litigation yet, and we label it as being destructive to tribal interests and well-being.

Now as to what steps, we don't want to be completely negative. We like to sometimes look at the positive side if possible. What can we do to resolve those water problems?

First, there should be an honest recognition of the Winters doctrine in dealing with Indian water rights which has not been done as yet. Winters has been looked at mostly in just saying that enough water has been acknowledged for the purposes of the reservation.

There is an active policy going on now to limit the use of Indian water by trying to define what is irrigable land using criteria from the 1870's. Obviously by technology what is irrigable now was probably not irrigable then, so there are ways where irrigable lands can be established on many reservations and yet that is being actively fought on addition of water to many reservations allocations, so that official recognition of Winters as being the basis for all negotiations should be a requirement before any decision to negotiate is made by any tribe, and have established a good faith on both sides which is essential and necessary to reaching an honorable agreement.

Second, the Federal Government, all its agencies, must assert the trust responsibility. There has been enough said about that so I won't dwell on it because our letters over the years have been loaded with complaints about the lack of trust responsibility.

Third, the Federal Government and Congress should promote and support legislation and policies which assures that the legal water rights of tribes are federally protected and that any litigation between the various States and tribes will be heard only in Federal courts because negotiation is not the only answer to the water problems.

Fourth, the Congress must assure that adequate funds, as the gentleman said, he mentioned adequate funds, Federal funds must be there for the non-Indians who are going to lose land.

I would suggest also that before all that happens, that funds be made available to the tribes to provide the necessary protection of their water rights. At this present date, we have several tribes, and I am sure you will hear from them today, who have something to say on that.

Fifth, tribal representation on interstate stream commissions and interstate commerce commissions and other commissions which is responsible for watershed oversight will show good faith and respect for the Indian water rights of those tribes whose lands are affected by that watershed. Congressional support for legislation to establish this will be evidence of that good faith and respect.

Finally, Mr. Chairman, there must be substantial funding for tribal water development planning and engineering and for the actual construction of those water projects. This type of assistance would not be unfair to non-Indians for the Congress, as mentioned above, already built massive water projects for them, and now those same beneficiaries who know that the tribes have been deprived and prevented from utilizing their rights to water, are now saying to the tribes use it or lose it.

You cannot use it until you have some way to put it to use, and that is what the tribes are asking for now before it is negotiated away, so it is not surprising that those water users who have benefited from Federal water projects are now the ones seeking additional allocations.

Now if my statement seemed to anyone to be overly long and tinged with paranoia, let me assure this committee and people here today, that every creature of nature will exhibit a strong concern for their survival when a threat presents itself, and we have a strong national threat against Indian tribe sovereignty this very day.

The American Farm Bureau, the National Association of Counties, the National Council for Constitutional Equality, the Interstate Congress on Equal Rights and Responsibilities, and more recently the Republican Party of Arizona, have all drafted resolutions which propose calling for termination of any tribes as being federally recognized and also abrogation of treaties. This is documentation. The Times Mirror magazines are carrying on a national campaign to suggest to their readers that the tribes be terminated, so it is not a thing that we have just suddenly dreamed up. It is a thing that has built up over the years. There are anti-Indian factions out there who would like nothing more than to see not only our water rights taken away, but see the tribes terminated, so in summary, Mr. Chairman, we would like to ask that at the conclusion of this hearing or this workshop and the development of the record that some of those recommendations be taken into account very seriously because years of hopeful patience and sometimes misplaced trust in the sincerity of legal trustees have caused the tribes irreparable harm, so with that statement, Mr. Chairman, I relinguish my time. Thank you.

[The prepared statement of Mr. Savilla follows:]

NATIONAL TRIBAL CHAIRMEN'S
ASSOCIATION

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STATEMENT OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION BEFORE THE SUBCOMMITTEE ON PUBLIC LANDS AND NATURAL RESOURCES OF THE U.S.SENATE, by Elmer M. Savilla,Executive Director. June 19, 1984

The United States, ever since the early federal-Indian relationships, has always encouraged Indian tribes to become farmers and ranchers and to make better use of their lands. To do so, Indian tribes need water.

Indian tribes are being encouraged to attain self-sufficiency by means of economic development. To do so, Indian tribes need water.

Self-sufficiency and economic development will mean making a monetary profit from new development, and, creating new employment opportunities for tribal members. New development and employment opportunities will require new housing and better community services, It will require the installation of infrastructural facilities such as: Indian-owned power projects; Indian-owned water systems and more efficient irrigation projects. The Indian need for using more of their water allocations is inevitable, and necessary, if permanent development is to take place.

Their use of water in sufficient quantities is tied to their very survival, especially in the arid regions. Unfortunately there are those non-Indians who vehemently resent any Indian ownership of legal water rights. Such resentment creates problems not only for Indian tribes, but also for the federal government and all of its' Agencies who have a Trust Responsibility to protect those Indian water rights.

Today, you will hear of the similar, yet diverse, problems which Indian tribes from all parts of the country are experiencing in trying to assert their legal water rights and beneficially use that water. But the truth remains, that apart from local or regional problems, the cause and effect of those problems has its roots in the failure of the Trustee to do its duty in regards to those Indian water rights.

There is no escaping the fact that the United States has allowed itself to become committed to a policy of MANIFEST DESTINY--the self-fulfilling prophecy that Indians would somehow disappear by assimilation or economic destruction by the opening up of Indian country to white settlement and the exploitation of Indian resources.

That MANIFEST DESTINY policy requires that in order for the Indians to disappear, development opportunities for tribes must not be readily available, otherwise Indians would not disappear as prophesied.

Massive western non-Indian water projects have benefitted by federal assistance while Indian tribes have been systematically denied such assistance. The deprivation of their water rights by deliberate federal actions is the most glaring example of the destructiveness of that MANIFEST DESTINY federal policy.

Too, the Trustee United States has allowed the ugly head of regional special-interest politics to interfere with its' legal duties to protect Indian water rights. Additionally, the Trustee has allowed a "conflict-of-interest" within its' federal agencies, principally the Department of Interior and the Department of Justice, to govern whether or not Indian rights would be advanced and protected.

If these charges seem harsh we only have to review the record. Some examples stand out:

1. In the Arizona versus California lawsuit all of the elements of assistance and protection for Indian tribes were systematically denied by not only the federal agencies, but more conclusive was the actions of the U.S. Supreme Court. At least two of the Justices are large landowners in Arizona and therefore had a conflict of interest. To add an insult to this fact, the Justices decided against the Indian tribes not in the interest of justice, or the upholding of Indian legal rights, or fairness---on the contrary, the decision of the U.S. Supreme Court was rendered , quote, *"in the interest of finality"*, unquote.

This decision was rendered and at the same time admitting and acknowledging that the United States had not properly represented the Indian interest.

2. In the well-known Pyramid Lake Paiute Tribe suit to retain their rightful allocation of water from the Truckee and Carson Rivers the U.S. Supreme Court again decided against the Indian tribe. In this instance the political power-play was so evident that it places a stain of shame upon those who deliberately plotted against the tribe.

To bolster this strong statement I submit as part of my written testimony, a letter from Senator Laxalt of Nevada which was sent to the U.S. Attorney General William French Smith. That letter is dated October 7, 1981 and it admits to the political situation in the case and it suggests that the Attorney General and Senator Laxalt were co-conspirators in taking the Pyramid Lake Paiute Tribes precious water. This letter was sent to the Attorney General months before the Court decision was announced in April of 1983.

3. Former Interior Secretary James Watt, while professing to recognize the authority of the Tribal Governments refused to meet with the tribal leadership to discuss the water issues and problems. Instead he chose to "divide and conquer" by arranging for clandestine meetings with Indian organizations who were willing to cooperate. Several such meetings took place with the Western Regional Council which is a group of large western non-Indian water users, and in December of 1983 at a meeting in the Secretarys office the Secretary committed 4.9 million dollars to their combined effort to encourage Indian tribes to negotiate away their precious water rights. It is interesting to note that the National Tribal Chairmen's Association was refused an invitation to that meeting.

INHERENT CONFLICT OF INTEREST IN INTERIOR.

In October of 1981 the Office of the Solicitor, Interior, at the request of the Secretary developed an opinion on the Nature and Extent of the Secretarys Trust Responsibility When Indian Interests Conflict With Other National or Departmental Interests.

This arose from a departmental conflict in Yakima Indian Nation v. United States. That same conflict affected the Department of Justice as well. That memorandum of opinion was considered to be so controversial (apparently) that Interior refused to let anyone outside review it, even upon request under the Freedom Of Information Act. Finally, a year later and only with congressional pressure, it was released.

The importance of that opinion was that it allowed the Secretary to make a *"legal judgement"* as to whether the Indian position was *"superior"* in the conflict. More importantly, even if the Indian position was found to be superior, the Secretary was allowed to use his *"discretion"* in defending the Indians.

What this amounts to is actually a *"Kangaroo Court"* decision which allows the Secretary to escape his fiduciary duty to the Indians. I will submit a copy of that memorandum to you.

Mr. Chairman, one issue which I want to make clear to this Committee today is that in spite of the existence of an impressive collection of laws favorable to Indian tribes, the legal rights of tribes are being ignored, neglected, and violated, even as we speak here today, by those parties having the responsibility of upholding and enforcing those rights---namely the federal agencies.

If properly administered and applied, those laws would protect against the divestiture of Indian water rights and enable tribes to look to future economic development and security with confidence. Instead they are forced to proceed with extreme caution and to trust almost no one.

Ever since the passage of the Reclamation Act of 1902 massive federal subsidies for non-Indian water projects encouraged the settlement and occupation of new lands with the subsequent development creating new demands on the water supply. Through no fault of their own Indian tribes find them selves in a life-or-death struggle for their very existence. In 1978 a report from the General Accounting Office and from the Presidents Office acknowledged that *"The federal government has led the way in developing the West for non-Indian beneficiaries"*.

This development was undertaken by the U.S. without regard for the long-range future of Indian tribes. Complaints from Indian tribes were swept under the rug. The answer to the Indians complaints, according to the GAO and some members of Congress, is "quantification" of Indian rights to water, or "negotiation" of water rights.

To most Indian leaders *"quantification"* means the same as a *"limitation"* of water rights. To most Indian leaders "negotiation" means an outright denial of rights. And to most Indian leaders both of the above terms will open the doors to an outright theft of Indian water.

Indian tribes have not had the benefit of massive federal assistance for water and land development. Instead the assistance provided for non-Indian development has resulted in millions of acres of Indian lands being flooded and are now underwater. The Indians losses from federal water projects now benefit the same non-Indians who now seek ownership of the remaining Indian water.

Negotiation would seek to balance the competitors for water without regard or consideration for the federal governments Trust Responsibility for tribes. To date "negotiated agreements" have resulted in legislative solutions. The problem with this solution as Indians see it is that the legislative proposals seem to start with the unanimous conclusion that any existing law which supports Indian water rights is downright detrimental and downright inconvenient to non-Indians and needs to be changed.

Most Indian leaders condemn this type of anti-Indian solutions. *What is completely overlooked by the authors of negotiated agreements is that Indian water rights are completely protected by the 5th Amendment of the U.S.Constitution.*

Any compromise, expropriation, or appropriation of Indian water by these "negotiations" should entitle the tribes to billions of U.S. dollars in compensation for the loss of the water. Yet those negotiated agreements which have been made to this date have provided only token compensation for those tribes, and further, although completed and agreed to over a year ago, no tribe has yet received the agreed upon amount. Are these agreements to be treated with the same disregard as have the over 550 U.S./Indian treaties? ALL of those treaties have been broken by the U.S.

The National Tribal Chairmen's Association cannot in good conscience endorse the "negotiations" process which is being foisted upon the tribes. It is not an acceptable alternative to litigation and we label it is being destructive to tribal interests and well being.

In a final word on "negotiation" I recall a statement made by President Kennedy in 1961 on international negotiations:

> *"We cannot negotiate with those who say "what's mine is mine, and what's yours is negotiable".*

Indian leaders see that attitude in state governments and some federal agencies.

Now, as to what steps can be taken to resolve water rights problems----

First there MUST be a honest recognition of the Winters Doctrine in dealing with Indian water rights. Winters is specific as to the rights of Indian tribes. An official recognition of Winters should be a basic requirement before any decision to negotiate is made by any tribe. This would establish the "good faith" which is essential and necessary to reaching an honorable agreement.

Secondly, the federal government and all its' agencies, especially the Bureau of Indian Affairs, must strongly assert its' Trust Responsibility for Indian tribes using the most exacting standards. It must open the doors to open and honest consultation with tribes and make all necessary assistance provided by law, available to the tribes without delay, foot-dragging, or opposition without basis.

Third, the federal government and the Congress should promote and support legislation and policies which assures that the legal water rights of tribes are federally protected and that any litigation between the various states and tribes will be heard ONLY in federal courts.

Fourth, the Congress must assure that adequate funds and assistance are appropriated and made available to the tribes to provide the necessary protection of their water rights. Oversight by a congressional committee is a necessary factor to make sure that the funds are spent as provided for.

Fifth, tribal representation on Interstate Stream Commissions and Interstate Commerce Commissions, and any other commission which is responsible for watershed oversight, would show good faith and respect for the Indian water rights of those tribes whose lands are affected by that watershed. Congressional support for legislation to accomplish this would be evidence of that good faith and respect.

Finally, Mr. Chairman, there must be substantial funding for tribal water development planning and engineering, and for the actual construction of those water projects. This type of assistance would not be unfair to non-Indians for the Congress has, as mentioned above, already built massive water projects for them....and now those beneficiaries, who know that the tribes have been deprived and prevented from utilizing their rights to water are now arrogantly saying to the tribes, "USE IT OR LOSE IT".

As all of us who are familiar with western water law know, that phrase of "use it or lose it' has become almost law and has been effectively used against superior priority water users.

Not surprisingly, those water users who have benefitted from federal water projects are now those who seek additional allocations and there is only one source for additional water: from Indian tribes. They have banded themselves together into the Western Regional Council and have sought and apparently obtained, the alliance of some federal agency heads to devise ways to get that Indian water.

If my statements seem to anyone to be overly strong and tinged with a paranoia, let me assure this Committee that every creature of Nature will exhibit a strong concern for their survival when a threat presents itself.

The public actions taken by those who covet Indian lands and resources are all too clear at this time. Witness the moves now being made to terminate Indian property rights by the following groups:

The American Farm Bureau Federation,
The National Association of Counties,
The National Council for Constitutional Equality,
The Interstate Congress on Equal Rights and Responsibilities.

They have all initiated Resolutions calling for either a serious curtailment of Indian rights, or an outright termination of tribal federal recognition.

More recently the Republican Party of Arizona drafted a Resolution which they ask to be included in the National Republican Party platform which calls for COMPLETE ABROGATION OF INDIAN TREATIES and THE TERMINATION OF ALL INDIAN TRIBES. I would hope that all fair-minded Republicanswould immediately distance themselves from such a position.

For over a year the Times Mirror Magazines, Incorporated, has waged a national campaign in their publications to encourage their readers to become anti-Indian. Their articles and editorials are of an extremely inflammatory nature, and of the kind which would appeal to prejudiced and racially biased persons. They have urged readers to believe that all tribal treaties, tribal hunting and fishing rights, and the special federal recognition of tribes, should be immediately be terminated for the good of the "American Sportsman".

Today I am formally charging that the Times Mirror Magazines, Incorporated, of Los Angeles, California, is blatantly using the U.S. Mails system and their license to publish to carry on a campaign of RACIAL DISCRIMINATION AND PREJUDICE.

TODAY I AM CALLING FOR A NATIONAL BOYCOTT OF ALL PUBLICATIONS OF THE TIMES MIRROR, INCORPORATED. Today I appeal to all American Indian persons, all minority people who suffer from similar prejudicial activities, civil rights groups, churches, anti-discrimination groups, and all friends of American Indians to immediately refuse to buy and read any of the Times Mirror publications.

It is the belief by a majority of our membership of 178 tribes that we are being led down a path which has as its' goal the eventual loss of Indian resources. IF this allowed to happen then surely termination of the unique and Constitutional Trust relationship will follow.

The Indian tribes know this and realize the dangers fully. What they don't know, and ask, is "*Does anyone in power care about the plight of the tribes?*" President Reagan has failed to answer any of the tribal letters of concern. The Congress then has the most responsibility to protect our resources.

SUMMARY.

In spite of a formidable body of federal laws which were developed over the years and designed with goals of protecting and enhancing the development of American Indian-owned resources, and

In spite of the unique special status given to the American Indian tribes by the supposedly sacrosanct Constitution of the United States of America, and

In spite of the legal and binding Trust Responsibility of the United States government for American Indian tribes, and

In spite of assurances by the written and spoken word of the past and present Presidents of the United States, and members of the Congress of the United States,

In spite of all this legal protection and assertions the Tribal Governments and the citizens of American Indian Nations find themselves, in 1984, to be in the midst of the most dangerous threat to their existence since the genocidal policies of the U.S. Army in the 1870's.

Tribal Governments are encountering seemingly deliberate actions by federal agencies which are against their best interests, actions which seem designed to assist those who are coveting Indian water resources.

Non-Indian water users have received massive federal assistance for project development while lands under Indian jurisdiction have been historically and systematically deprived of similar assistance.

Conflicts of interest are rampant among those federal agencies and Courts charged with the solemn Trust of protecting Indian water rights.

As a direct result of years of hopeful patience and a misplaced trust in the sincerity of their legal Trustee to its' duty and to now find themselves on the brink of annihilation as Indian tribes, the Indian tribes are now willing to go to any lengths to impress on one and all that present policies are working an unprecedented hardship on them and an irreparable harm will result if those destructive policies are allowed to continue.

We ask that the Secretary of the Interior be directed to consult with and listen to the advice and recommendations of the tribal leaders and that this Association of Tribal Governments be included in all meetings wherein tribal interests in water is discussed.

We ask that the Secretary of the Interior immediately repudiate the offensive in-house memorandum which allows him to unilaterally choose when to perform his Trust duties. He should take immediate steps to assure the tribes that he will faithfully and honestly uphold his Trust duties for Indian water rights, even in the event of a departmental conflict-of-interest.

The tribal leadership is not pleased with the dereliction of trust responsibilities for water rights, and they perceive those non-actions and roadblocks as leading towards the transfer of Indian water rights cases to the jurisdiction of the State courts rather than the federal courts where they so rightfully belong.

The Interior Department has been pressuring Indian tribes to negotiate their water rights away rather than litigate. Before any tribe would agree to negotiate we ask that the Interior Department should make a full disclosure to that tribe of any possible adverse consequence to the tribe if negotiations are entered into. Also, any agreement to negotiate should contain escape clauses for use by the tribe if at any time it becomes necessary to halt negotiations for any reason that may be determined by the tribe.

The tribal leadership declares that the elected leadership of the Tribal Governments, individually or in unity, are the only entities with the legal authority to speak for them. The federal agencies will speak or confer with them and no others. The Presidents Indian Policy is a mandate in this regard and we hold the departmental Secretarys responsible to implement that policy.

As a good faith first step in that direction we ask that the Secretary of the Interior immediately schedule a conference where the Indian tribes in full assembly can speak to him. The items for discussion would include adverse departmental attitudes and activities; tribal recommendations for overall improvement of the Bureau of Indian Affairs in regards to water rights and the Trust Responsibility.

We do not expect a positive response from the Secretary or the Administration to our request for a meeting because to this date our requests have fallen on deaf ears. But we do consider it very indicative of the low level of concern by the President and the Secretary of Interior for Indian affairs.

The tribal leaders look for an assurance from their Trustee that their lands and resources will be diligently protected from the grasp of the various States, private utility companies, powerful Irrigation Districts, and the even more powerful private Corporate interests. Without such assurance it can be predicted that during the next few years chaos will result in the field of Indian affairs with disastrous consequences for Indian and non-Indian alike. This Committee, hearing and heeding the testimony of the tribal leadership given here today, has an opportunity if it is accepted, to prevent future hardships and serious problems between the Indian and non-Indian people of this great Country.

I appreciate this opportunity to express the views of the National Tribal Chairmen's Association to you today.

end/ems

Senator WALLOP. Thank you, Elmer. I think we have seen that there is a bracket at least now. As I listen to your written charges and argument for doing nothing, staying out of the courts and not negotiating and not having a congressional solution because all of them are bad, that doesn't get us to the circumstance which I think you and I would agree we must reach. I cannot imagine any solution to this in which only one side suffers a loss at some level. It is just not going to be possible. Water rights on all sides are negotiated, legislated, and litigated, to a compromise between the rights of Indians and non-Indians because the dimension of our problem is the quantity of water that doesn't grow. Only the problem grows, and that is why we are here, and I appreciate your taking the time and the effort to come and make your comments.

It is my great privilege and pleasure to introduce the moderator of the morning's session, Mr. Richard Trudell, who is the American Indian Lawyer Training Program director.

Dick, I appreciate very much your willingness to come here and try to get our panel to describe in detail what they see as the nature of the problem.

The first panel is devoted to Federal responsibilities to Indians with regard to water. Agencies of the Federal Government having jurisdictional and trust responsibilities to Indian people involving water or water rights will describe the authorities, guidelines, and policies under which they operate.

The panelists consist of Mr. Ken Smith, Assistant Secretary for Indian Affairs, Department of the Interior; Ms. Mary Walker, Acting Solicitor of the Department of the Interior; Mr. Hank Meshorer, Chief, Indian Resources Section of the Department of Justice; Mr. Stuart Jameson, Office of the General Counsel, Department of Agriculture; Mr. Ron Allen, Assistant Chief Counsel to the Army Corps of Engineers; Mr. Leigh Price, Indian Coordinator, Environmental Protection Agency; Mr. Kent Ballentine, Water Quality Standards Office, Environmental Protection Agency; Mr. Al Havinga, Indian Coordinator, Drinking Water, Environmental Protection Agency; Mr. William Lynn Engles, Commissioner for Native Americans, Department of Health and Human Services; Mr. Will Daellenbach, Indian Health Service, Department of Health and Human Services.

If I can ask you ladies and gentlemen to come up here, Senator Hecht and I will make room for you. Dick, I will then turn the workshop over to you.

[Brief pause in the proceedings.]

Mr. TRUDELL. Why don't we begin with the first panel? I think it would be helpful if I would just kind of basically set some ground rules I guess so that, as the Senator pointed out in his opening remarks, to really hopefully see full participation which includes the audience as well as the panelists.

Looking at the program, there are 10 speakers or panelists on the first panel, so I think it would be helpful if each panelist would within reason try to keep his or her remarks to roughly 5 minutes and then to reserve the last half hour of the time allotted for the first panel for questions and answers from the panel and the audience. I think that it would be, or I think it will work, flow a little better if we handle it that way, so rather than eating up more time, I will call on Mr. Ken Smith to get the panel underway.

STATEMENT OF KEN SMITH, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. SMITH. Thank you, Mr. Chairman. It sort of feels nice to be up here on the other side of the fence for once!

I would like to thank you, Dick, and the members that had a hand in putting this forum together. It was a good idea to sort of sit down and review what are our problems and all the possible solutions to all the many problems we have.

As we all understand, it is a complex issue. It is not a 1 plus 1 equals 2. It is a diverse area that I think we are getting into, and there is not an easy solution. There are probably many ways to attack the problems that we do have, but I think one way is sitting down together with the Government, the State government, the private sector, and with the Indian tribes, to just come together and just have a discussion, and maybe we can come up with something through this dialog that we are going to have.

While I have prepared some brief remarks this morning, my main purpose is to listen and to learn. Now I will be the first to say I don't have all the answers. I don't think anybody in my Department has all the answers, and I don't think any one person has all the answers. This is of course, a complex issue.

I would like to speak for just a few moments on the subject of our Federal responsibility. A national Indian water policy responsive to the Federal trust responsibility must encompass several aspects. The problems and opportunities confronting different tribes in different regions are diverse, and all of these policies must accommodate these diverse needs. The solution for one tribe may not work for another tribe. We must work with each tribal government separately in order to come up with the best solution for that particular tribe. There are tribes that we have talked to that want to negotiate. That's great. Some want to litigate. That is their option. And there might be something in between, but each tribe is different. Each issue is different.

You have a lot of different plans. Personalities are different in communities, so I think you have to take it case by case and come up with each respective solution with each respective government out there.

We, in Indian Affairs, and from the Indian perspective believe it is clear that we must, first, make it possible for Indian people to enjoy and prosper from existing use of water. Ensuring this will call for prevention of trespass and the efficient management, operation and maintenance of existing Indian water development.

Second, we must establish and quantify rights for present and future uses of water. We are committed to achieving this end through negotiations where appropriate and when necessary, or litigation when necessary. We look forward to the time when Indians will have wet water and plan for the beneficial use of that water.

I feel strongly about wet water. I have heard the pros and cons and I guess we could talk all we want. I believe that our objective is to get wet water for tribes, whether we get it through negotiations or through litigation. Sometimes litigation takes years, and I have the feeling that if we wait around for another 20 or 30 years there won't be any wet water to divide up. Someone else will have that wet water. Look in the Southwest; do you think they are going to dry up Phoenix? If you think you are going to dry up Tucson and take away water from them, we are fooling ourselves. I really think our objective is to get wet water for tribes for their beneficial use.

With these three components as a framework for our trust program, we have begun to develop the pieces. Unfortunately, we do not have the resources to achieve this program development all at one time. However, we have begun the process and set priorities. Of course, we don't have a bank full of money. We have to fight for every dollar we get. I think we are getting a few more dollars every year, and we are trying to increase that.

When water rights issues are the subject of formalized negotiations or litigation that affects a tribe, and the United States may be required to respond to deadlines over which they have little or no control. Failure to respond is not in our view an option. Currently, we place an extremely high priority on taking all steps necessary to establish a quantifiable right for present and future uses of water.

From experience, we know that the bare existence of a right to water is not significantly beneficial to Indian people. Some means must be provided to protect that right from trespass and to convert the right into benefits. In the first instance, this may entail going to court to protect the existing right, and we are doing that. In the last instance, the irrigation and other water-using developments must be put in place before Indians can benefit from water. This policy represents a recognition of the vital importance of the water to the Indian tribes and their goal of economic self-sufficiency.

The importance is magnified when viewed in the environment of greater emphasis being placed on water rights by non-Indian water users and the State governments. A much—needed dialog on the entire spectrum of issues related to Indian water rights is now occurring and must continue. We must find more solutions leading to equitable negotiation, negotiated settlements, or successful litigation.

I come to this workshop today in the spirit of continuing this dialog and exploring not only the responsibilities of the United States, but also the responsibilities of the tribal leadership and Indian potential, and in the end, I think we all have the same objective. We want to be able to get wet water for tribes and be able to have those tribes benefit from that wet water.

Mr. **Trudell**. Thank you, Ken. The next panelist is Mary Walker, the Acting Solicitor of the Department of the Interior.

STATEMENT OF MARY WALKER, ACTING SOLICITOR, DEPARTMENT OF THE INTERIOR

Ms. **Walker**. Thank you. I, too, look forward to this workshop and appreciate Senator Wallop's work in bringing it to pass.

As someone new in the Department of the Interior, I am aware of the issue and keenly aware of its importance not only to the West, but the Nation, and certainly to the Indian tribes that we have a responsibility to concerning the Department.

My remarks are basically designed to present the legal framework for the Federal responsibilities and, of course, those responsibilities involving Indian water rights derive primarily from two sources—judicial decisions and acts of Congress.

Judicial decisions are significant because they establish the reserved water rights doctrine. The reserved water rights are held in trust by the Federal Government for the use and benefit of the Indians, and as trustee, the United States has several responsibilities.

It has, for example, the responsibility to protect the Indian reserved water rights in quantification proceedings whether conducted in State or Federal court.

It has the responsibility to protect, develop and manage the Indian water rights and each of that management and development has been appropriated into acts of Congress.

We have the responsibility for developing and presenting evidence in quantification proceedings, and the responsibility for protecting existing water development.

We also have the responsibility for providing efficient management, operation and maintenance concerning those water rights.

The United States also has a responsibility, as Ken Smith indicated, for ensuring that the Indian tribes receive more than just a "paper" water right, but in fact that they receive "wet" water as he referred to that term and as it has become known.

Our view at the Department is that we can best ensure that through negotiated settlements which avoid the expense and the long delay of protracted litigation, and we believe that those negotiated settlements can be drafted so that they ensure that the tribes actually receive water.

Beyond that, I guess I would like to say that where we have participated actively as a Solicitor's Office and as the Department in seeing those agreements come to pass, we have also been prepared as a Department to follow them up, and I think that you see a commitment which has existed in the past and which continues on into the future for resolving those disputes. Certainly as a new member of the Secretary's team but also as a person who has been in the Federal Government beyond just my new tenure at the Department of the Interior, I am aware, as I said, of this problem, and keenly committed to doing what I can to help resolve it, and again I think this workshop is a good start for bringing all of these together. We look forward to hearing from you, the audience, in terms of some of your ideas, hoping we can flush out new ideas as to what we believe to be the best solution for this problem.

Thank you.

Mr. TRUDELL. Thank you, Mary. The third panelist is Mr. Hank Meshorer, the Department of Justice.

STATEMENT OF HANK MESHORER, CHIEF, INDIAN RESOURCES SECTION, DEPARTMENT OF JUSTICE

Mr. MESHORER. First I want to say hello to a lot of friendly faces. It looks real good to see my neighbors from the West come back and visit. I apologize for the weather.

The Department of Justice is a litigating agency, as we all know, and as a result, our goal is one where if there is litigation, we conduct the litigation, and if there is no litigation, we are not involved. It's that simple.

The guiding principle that we follow at Justice with regard to Indian matters is that we have a trust obligation, a special relationship, stated by the court, by the Executive, and the legislature, and by the people, and in that respect we have a slightly independent role from the Department of Interior in that Interior makes the policy decisions, makes decisions with regard to the program analysis aspect of the Indian relationships, whereas Justice, as I said, is involved in litigation and litigation decisions.

We try to avoid litigation. We have as much as we can handle, and look to settlement of not only Indian water rights cases, but litigation generally. We recognize that we need certainty out West. I don't use the word 'certainty' as a code word, but I would like to see an end to the litigation and let everybody get on with their lives free from the anxiety caused by uncertainty with regard to who has control of the water and to what extent.

We at Justice consider ourselves as the representative of the United States as trustee for the tribe, and honor the special relationship that has existed basically since the Indians and non-Indians first met, and find no problem and are comfortable with that situation.

That is all I have to say at this time.

Mr. TRUDELL. Thank you, Hank. The fourth panelist is Mr. Stuart Jamieson with the Department of Agriculture.

STATEMENT OF STUART JAMIESON, OFFICE OF INTERGOVERNMENTAL AFFAIRS, DEPARTMENT OF AGRICULTURE

Mr. JAMIESON. Thanks, Dick. I am not aware of any direct involvement of the Department of Agriculture in Indian water rights; however, I would like to take this opportunity to briefly mention USDA's activity in Indian affairs.

The Office of Indian Affairs in the U.S. Department of Agriculture was established in 1974 for the purpose of coordinating all of the Department's activities of interest to the Indian population and to bring such activity to their attention. In addition, I saw the need for the programs of the Department to become more applicable to the reservation setting. It was with that in mind that I accepted the position as the Indian Affairs specialist for the Department. Mr. Savilla of the National Tribal Chairmen's Association also mentioned earlier of the many Federal programs that are available to non-Indians but are not accessible to Indian tribes.

In satisfying my concerns, a review of the Department's program delivery systems revealed some 80 changes that would make them more available to reservation life. To date, over one-half of the needed changes have been made allowing greater accessibility of

USDA assistance to the Indian population. For instance, what this means dollarwise is, in 1976 the level of assistance by the Farmers Home Administration was around $40 million; in 1983 the amount had increased to over $190 million.

Perhaps the most significant change in USDA is to recognize tribal governments and tribal laws must be observed when providing assistance on Indian reservations.

In the area of employment, just a few years ago less than 400 Indians were employed in USDA. Today, over a thousand are employees of the Department.

In general, progress is being made to better assist Indian people. Maybe not as rapidly as it should, but nevertheless there is progress. This is noticeable in the Department's economic development and housing assistance programs.

USDA works closely with the Bureau of Indian Affairs in setting up the delivery and servicing systems of the programs to tribes to make sure that the delivery system requirement does not infringe on the trust responsibility of the Federal Government and to work under those guidelines to provide USDA assistance to Indian reservations. With that I will answer any questions you may have.

Mr. **TRUDELL**. Thank you, Stuart. The fifth panelist is Mr. Ron Allen.

STATEMENT OF RON ALLEN, ASSISTANT CHIEF COUNSEL, U.S. ARMY CORPS OF ENGINEERS

Mr. **ALLEN**. I am Ron Allen. I welcome the opportunity to participate in this workshop on behalf of the U.S. Army Corps of Engineers.

The Corps of Engineers has a very limited direct involvement with water rights issues because the corps does not normally require water rights to carry out its water resources development activities.

Moreover, corps water resources projects in the Western States do not occupy lands that have been reserved from the public lands for the purposes of those projects.

Consequently, the corps does not claim or administer Federal reserved water rights for its projects and has limited experience on the issue of how reserved rights are to be defined and may be exercised by their legitimate claimants.

The corps understands, however, that the exercise of reserved water rights and other public or individual water rights can affect and be affected by the corps water resources development activities. We appreciate, therefore, the importance of our continued participation with the Congress, other Federal agencies, Indian tribes, and the States toward mutually acceptable solutions to the exercise of sovereign and private rights to essential water resources.

Thank you.

Mr. **TRUDELL**. Thank you, Ron. Would the remaining panelists make sure that you are speaking directly into the mike? I think some of the people in the back are not able to hear you and they have got the volume turned all the way up so I understand.

The sixth panelist is Mr. Leigh Price.

STATEMENT OF LEIGH PRICE, NATIONAL INDIAN COORDINATOR, OFFICE OF FEDERAL ACTIVITIES, ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY KENT BALLENTINE, OFFICE OF WATER REGULATIONS AND STANDARDS, ENVIRONMENTAL PROTECTION AGENCY; AND AL HAVINGA, OFFICE OF DRINKING WATER, ENVIRONMENTAL PROTECTION AGENCY

Mr. PRICE. Thank you, Mr. Moderator. I will keep my remarks short as there is one basic point I would like to make clearly. That point is that the Environmental Protection Agency's activities deal primarily with water quality, not water quantity, which is the subject of today's discussion.

Water quality, of course, is very important to the people of the West, to Indian Tribes and non-Indians alike, and it does relate to water quantity in that to have full ownership and use of your water, it must be of sufficiently good quality for the use you have in mind.

The Environmental Protection Agency's responsibility is to protect the Nation's water quality through regulation of water pollution sources. As water quality is preserved the quantity of usable water is likewise preserved for the benefit of all water right holders, whoever they may be.

EPA's water quality control activities are of obvious interest to water users, but it is important to remember that EPA does not determine who those users should be. Having that point in mind, if you have any questions during the day today on EPA programs and how they affect water quality, please call on us.

I have with me Mr. Kent Ballentine from the Environmental Protection Agency's Office of Water. Mr Ballentine is a professional staff specialist in water quality standards. We also have Mr. Al Havinga, from the Office of Drinking Water, who can answer questions in that area, which I know is also of interest to tribal governments.

I will close my remarks, and at the proper time we will be pleased to receive any questions you may have.

Mr. TRUDELL. Thank you. We will move down to Mr. Engles.

STATEMENT OF WILLIAM LYNN ENGLES, COMMISSIONER FOR NATIVE AMERICANS, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Mr. ENGLES. Thank you, Mr. Trudell, and thank you for the opportunity to discuss the views of the Department of Health and Human Services on the important issue of water rights. As a context for these views, I believe I should give you a brief overview of the administration for Native Americans.

The Native American Programs Act which is administered by ANA promotes self-sufficiency for Native Americans by providing financial assistance for locally determined strategies for social and economic development. This includes energy and natural resource development. Self-sufficiency is defined as the level of development at which a Native American community, that is to say, a tribe, can control and internally generate resources to provide for the needs of its members and to meet its own short and long-range social and economic goals.

Social and economic underdevelopment is the paramount obstacle to the movement toward self-sufficiency of the tribe. It contributes to high unemployment, high school dropout rates, poor health, and other problems which affect Indian people to a greater degree than almost any other population group.

The lack of a strong, diversified economic base has resulted in a dependency on federally designed, federally funded, and federally operated programs.

ANA's approach is to counter this through a policy of fostering a locally determined balanced developmental approach through three goals.

They are to promote the strengthening of tribal governments, Native American institutions, and local leadership to assure local control over all resources; two, to foster the development of stable, diversified local economies to provide jobs and reduce dependency on welfare services; and three, to support local access to and coordination of services and programs which safeguard the health and well-being of Native Americans.

These goals underpin the premise that the local Indian community has the primary responsibility for determining its own needs, increasing its capacity for self-governance, for planning and implementing its own programs, and for building an economic base from its own natural, physical and human resources, including the development and use of energy, water and other natural resources.

The ANA funding approach moves the focus from increasing dependency to increasing productivity of both individuals and communities. It is a competitive review process that awards grants to successful applications who are evaluated on the merits of their proposed social and economic development strategies against published criteria.

For example, during our current fiscal year review process, applicants have been encouraged to consider innovative and locally developed approaches which address the real issues in resource development and in the utilization and control of these resources.

These can include the enactment of environmental protection codes, the enactment of codes and ordinances to support energy, water, and resource development, and Indian participation in the local and State advisory boards that influence the allocation of public resources.

With regard to how the issue of water rights relates to this, there is evidence that the social and economic development strategies that ANA funds are having a positive impact. Tribes and other community grantees have realized successes, and these include improved management and profitability of their natural resource development. This approach has put many Indian people to work in nonsubsidized employment. It has brought about private sector participation. ANA's policy of funding development strategies has allowed maximum local flexibility and the directing of Federal, State, local and tribal resources to achieve local tribal objectives.

As examples of our efforts, ANA projects assist tribes to clarify State or Federal jurisdictional questions to avoid adjudicating water rights issues; resolve questions of upstream diversion of natural water flows that contaminate or pollute water reaching reservations; participate in the planning and development of dams to avoid flooding Indian lands; and establish or clarify entitlements to water to the satisfaction of all citizens.

An example of an ANA-supported project involving a different aspect of water rights is the Columbia River Inter-Tribal Fish Commission. The Commission was able to assume the regulatory and enforcement components of managing salmon and steelhead resources on the Columbia River system. It includes patrols to enforce both tribal regulations and Federal court orders, as well as restricting the illegal taking of a limited resource. The Commission provides for the protection of treaty fishing rights, and serves as a liaison between members of tribes, fishermen, tribal and nontribal courts, and scientists and attorneys involved in protecting this valuable resource for all U.S. citizens.

This new development of working relationships and partnerships between tribes, States, and local governments, the private sector, local communities, and individual land owners is important in addressing and promoting the resolution of issues concerning water rights. The elimination of barriers to the development and implementation of partnerships among all parties concerned with regard to water rights, benefits both Indian and non-Indian communities. This approach will lead to completing those developmental steps needed by tribes to achieve self-sufficiency.

I hope this brief overview provides you with a context in which to begin our discussion today.

Thank you, Mr. Chairman.

Mr. TRUDELL. Thank you. The final panelist is Mr. Will Daellenbach.

STATEMENT OF WILLARD DAELLENBACH, STAFF ENGINEER, INDIAN HEALTH SERVICE

Mr. DAELLENBACH. Mr. Moderator, fellow panelists and guests, I am a staff engineer for the Indian Health Service, Environmental Health Branch, Sanitation Facilities Construction Program. The Sanitation Facilities Construction Program is one segment of the Indian Health Service.

We by organization set below the Public Health Service which is within the Department of Health and Human Services, just to sort of tie it together.

Prior to transferring to headquarters, I served as field engineer with the Indian Health Service in California, Nevada, and Wyoming.

The Indian Health Service is the primary Federal health resource to approximately 900,000 American Indians and Alaskan Native people living in or near the Federal Indian reservations or in traditionally Indian country such as Oklahoma and Alaska. These people live over a widely dispersed geographic area comprised of more than 250 reservations, colonies and communities in 26 States and in hundreds of villages in Alaska. The Indian Health Service goal is to elevate the health status of the American Indians and Alaskan Natives to the highest level possible.

The Indian Health Service is administratively divided into 12 geographical program areas in which it operates over 48 hospitals, 400 health centers, field stations and health clinics. The multi-faceted environmental health attack involves the provision of sanitation facilities under the authority of Public Law 86-121, the Indian Sanitation Facilities Act of 1959.

This act authorized the construction and/or provision of domestic water supplies, waste disposal facilities and other essential sanitation facilities for Indian homes, communities and lands. With the completion of all the projects funded through fiscal year 1983, approximately 1,600 water and/or sewer community systems will have been built and transferred to tribal or native village ownership to serve over 141,000 Indian homes.

Most of the sanitation facilities construction projects funded in recent years by the Congress are for the Indian Health Service to provide sanitation facilities for Federal and tribal housing programs. We are currently receiving funding through the Housing and Urban Development and Indian Housing Authorities for offsite sanitation facilities service to new HUD units.

Water supply sources for both individuals and communities include ground water wells, surface water—streams, lakes, rivers—springs and fresh water impoundment sources. Projects funded by IHS are initiated at the request of the tribal council and completed through cooperative agreements.

We are interested in the topics of water rights, Indian water rights, the supply, the disposal, operation of sanitation facilities, solid waste disposal, potable water, as an advocate of the Indian people to inform others of the critical need that exists among Indian people for the provision of domestic water supplies.

Mr. TRUDELL. I want to thank the panelists for reserving enough time for questions and answers. As I mentioned prior to their making their statements, I thought we should set aside at least half an hour. The way it is turning out, we have got approximately 50 minutes before the second panel is scheduled to make their presentations.

I am sure that there are a lot of you in the audience that have specific questions for some of the panelists. I would like to, you know, just entertain some questions. Prior to your raising the question, if you would clearly state your name and your affiliation or associations with the tribe or private enterprise or what have you. I did not check with Ralph Cox or Elmer Savilla, but if they are in the room, if there are any remarks or questions for them, I think they should be posed as well, so I am sure some of you may have some concerns about contract or grant applications that you have before some of these people, so it is an opportunity to get a status report as well I guess, so let me just open it up.

Is there anyone in the audience that wants to pose a question to any of the panelists?

State your name and where you are from.

Mr. LATTIN. My name is Roy Lattin and I am from southern California, from the Palomish Indians, and our tribe is involved in the oldest active Indian law case in the United States. It was first filed in 1951 in the court of claims, and it was refiled in the district court back in 1968, and just—it is not a question. It is just a point of information.

I talked to Terri Sneider on the telephone a couple of weeks ago and tried to get some information what this meeting was going to be about, and it is supposed to be like what is the Federal trust responsibilities to Indian tribes?

And you know, in speaking with her as the person who is putting on a national workshop and educating non-Indians to what the problems are, I would just like to simply state to the non-Indians the main problem that I see—and I have been involved with our water case which is the oldest active Indian water case in the United States, I have been involved with it since 1968. I worked with Bob Hellinger as a research assistant back in 1968. Bob later formed the Native American Rights Fund in Boulder, and he has done a lot of work on a national level.

I see through my experience working with the Indian water rights, the main problem is a lack of infrastructure development on reservations that are involved in water rights or that, you know, do have access to water.

There is no place to point a finger for the blame other than to go to work solving the problem right now with the Department of the Interior. That is, to develop the infrastructure on Indian reservations, you know, in irrigating water and irrigating lands. You know, we need infrastructure development, pipelines, access to waterways and wells. That is the main problem.

You take a look at some of the Colorado River tribes that are right along the river and now they have their water quantified, and you know, they don't have the infrastructure development. You know, you can take a look at some of the tracts. They have many thousands of acres of flat irrigable land with no infrastructure, no wells, no pipelines, no roads, and you know, I think if you are going to talk about trying to solve the problems, that is the first place to look is the lack of infrastructure development.

Mr. **Trudell**. Thank you. I am sure that many of you have questions that you want to direct at the Department of the Interior regarding the current position or status as far as tribal water coding as well as the projections for funding for water-related activities on reservations, and I think that tribal leaders in the audience should take advantage of the opportunity to be more specific and pose those questions to the two panelists from the Department of the Interior.

Are there any tribal leaders here that want to raise those questions more specifically?

Mr. **Pinkham**. My name is Allen Pinkham. I am chairman of the Columbia River Inter-Tribal Fish Commission. To the Federal representative here I would like to address a problem concerning lowhead hydro development along the Columbia River.

There is a great deal, number of applications for licenses for lowhead hydro projects. The problem that the tribe has is that we don't have the technical assistance or the ability to address these projects on a cumulative basis; you know, what is going to be the effect of all these projects if these are built? What is going to happen to the water quality? What is going to happen to the natural fish resources? So these are the questions that we ask.

We don't have the technical assistance or the ability to address these problems, and if the Federal representatives would please respond to this today, either give us some kind of direction; or is there some kind or process that we go through to see what these effects would be? And under this trust responsibility see that they can get this done—Allen Pinkham, Nez Perce Tribal Executive Committee.

Mr. TRUDELL. Ken or Mary, do you want to respond to Al's questions?

Mr. SMITH. Well, I don't have some of my staff here, but I see Sid out there. Is this one, Sid, that we have addressed yet or are going to address in the Pacific Northwest?

It just appears to me we would have to throw in support for tribes to provide that technical assistance. Most of the time I think we don't have it in-house. We would probably have to buy it, and I am not sure what the other commissioners are doing in the Northwest, whether we could contract with one of the Columbia River Commission or the Northwest or something like that to maybe provide that, but it just appears to me that we should provide that maybe through one of the other mechanisms we have, but I think we should follow up on that particular issue.

Mr. TRUDELL. Are there other questions?

Mr. BOGGS. My name is Dan Boggs, Black Feet Tribe, the Tribal Council, and my question is in regard to finance for water-related projects development.

Now we have had our application for funding in here for a number of months. We are on the last phase of our FERC studies and our money is being held up by one individual—the area director in the Billings area, Mr. Lightson.

Now we have contacted the solicitor, the Department of the Interior, the BIA, everybody else along the line, and there is nothing wrong with our application. We have done our work and everything, but the money is being held up by one man, and this is just one of the cases.

We have also got application in for $400,000 for water studies and for other projects that we wish to move on, and we can't get any cooperation from the Billings area office, and this is something I would like to see checked into and get us some information back as to what steps we can take to move ahead on that.

We have only got until I think it is the last of August to get going on this project, and we are being held up by one individual—the area director in Billings.

Mr. SMITH. This is in my area again. He is one of our line officials out there in charge of that particular area, and I think he is a very good manager. I will probably have to sit down and either get Sid involved and make a call out there and follow through. I think we could take a look at the two items you have talked about and give you a direct response either from this office or whatever. I think that would be the way to handle it; at least give you an answer.

Mr. TRUDELL. There was a gentleman in the back of the room.

Mr. GORENZ. Frank Gorenz—the reason that many tribes are not willing to negotiate is, as the gentleman mentioned over here, we don't have the expertise to find out what we have. We need some expertise, and as much emphasis as we are placing on the water rights today, the Bureau should come out and set up a program for the tribes.

That is the problem. We don't have the expertise.

Mr. SMITH. I might add that is one area that hopefully in our fiscal year 1986 budget process we will be able to address, and at least ask for additional dollars in our budget because, first of all, Secretary Clark is making this a very high priority within the Department, and hopefully he will be very, very favorable to this request. But as you all know, we still have to argue with OMB, and after we get through with OMB, then we have to submit it to Congress, and really Congress has to approve it, so there are several levels to go through in the process. We are going to request additional funds for water development and for these types of studies.

Mr. TRUDELL. Kenny, can you kind of give any of the audience some idea as to the figures that are being discussed both for 1985 and 1986 as well?

Mr. SMITH. Well, I can't discuss the fiscal year 1986 budget figures at this point. I can only say that we probably will ask for an increase. I notice in our fiscal year 1985 request, the water policy implementation figure is $5,450,000.

Our litigation support is $2,762,000 that we requested from Congress, and our irrigation O&M is $8,119,000, and our irrigation construction is $11,981,000. Hopefully we will get a few more dollars and at least address the issue in 1986. Of course, we have not made any final decisions at this point.

I am just saying it is going to be a very high-priority item in our fiscal year 1986 budget process.

Mr. LATTIN. I would like to say something else. A major concern both with non-Indians and with Indians, is the concept of water quantification for Indian reservations, and again I would like to state that our tribe is right in the middle of southern California, and there are 14 million people who live in southern California and all the water in southern California is imported, and the only areas that do have water rights are Indian reservations, and so they are asking us to quantify our water.

Our people are saying, you know, you talked about water quantification, and they want us to say well, one third of our reservation is irrigatable and two thirds isn't and we will live with that from now until, you know forever.

In southern California they irrigate 90 degree slopes with modern technology, and so when you talk about water quantification, we are saying that all of our reservation, 100 percent of it, we want it quantified as irrigatable acreage, and I am sure that the tribes who have millions of acres are going to say the same thing.

Our tribe is small. We only have 15,000 acres, but it is right in the middle of southern California where land sells at $60,000 an acre, and so, you know, when we say we want to quantify all of our reservation, 100 percent of it, and there is no sense in talking about water quantification unless we can look at a hundred percent of our reservation land as being irrigable, and that is our position.

Mr. TRUDELL. Questions? I am sure that some of you have some concern, at least I have heard some just about this exercise in terms of a workshop that really addresses the whole country as opposed to just a region of it, and I think as the Senator pointed out in his opening remarks the magnitude of the issues, the magnitude of the differences that exist, and I think that in some respects, I think industry particularly has not really acquainted itself enough with the framework that the tribal governments have to operate in.

I think that the search for certainty, I guess that the pace is quickening for that to happen, and I think that as some tribal leaders have pointed out, the need for data that industry and States have would be useful for them to have as well because I think that when one looks at the West in particular, I mean the amount that they have been subsidized, it is just not tribes alone. I think if one takes a longer look at some of the Bureau of Reclamation projects, a tremendous amount of money has gone into them, and I think if one studies the rivers, in particular the Columbia, the Po, and the Colorado, how water has been routed around reservations, it is mind boggling, so I think that in terms of questions about funding for technical expertise as well as really in providing some tools for tribes to develop management plans or what have you is really critical, but I am sure that there are some tribal leaders that want to be more specific about some of their experiences with the various Federal agencies to date, and I think that should become or their experiences or frustrations should become part of these proceedings.

At least it is my understanding there will be some kind of record that will be made available to everyone who is here as well as the people that for whatever reason chose not to participate.

Questions? I think that I mentioned earlier there is a lot of concern, and I think that Interior in particular should really I guess restate its position, and I guess current position, on the moratorium that has existed on water codes, and I think that if Mary as well as Ken can address that in terms of what is being discussed, if anything, within Interior as far as assisting tribes with the enactment of their codes, to really encourage that whatever a tribe chooses to do, that they are going to support.

Mr. SMITH. Dick, something that I personally want to address this coming year is the water codes. We all know we have a moratorium on approving water codes. Correct me if I am wrong either, Paul, that the reservations that are under IRA usually, in their constitutions, require secretarial approval, and those are the ones on which we probably have a moratorium. But I understand the reservations that don't need the Secretary's approval can get into a proceeding with passing a water code.

Now we probably will be discussing this with the Solicitor's Office, and it is being bounced back and forth here right now. I am making the request. The solicitors and the attorneys you might say have some concerns—and I understand those concerns—but I think there is a halfway medium here. I think we have to take it case by case, depending upon the situation again.

I think there are certain tribes out there that we can approve water codes, and I feel very strongly about it because those local governments have to be able to regulate their water. It is like any other government regulates their water, so we have to be able to approve something, whether we call it a water code or what. There are tribes out there that I don't think will run into any political problem or any problem at all as they approve those water codes and proceed with them, but right now we are in the process of just having a discussion within the Department. Hopefully we will have some good news a couple of months down the road here.

Mr. **Trudell**. Any panelists?

Mr. **Muys**. I just want to make a comment as your co-moderator representing the non-Indian community on this topic of Federal responsibilities to Indian tribes.

Let me say at the outset I started out about 28 years ago this month as a student law clerk working in Arizona against California and litigating the boundaries of the Fort Mohabi and Colorado River Indian reservations so we could come up with what the magnitude of Indian water rights were for those mainstream reservations, and as many of you know, we are still at it 28 years later. I would say we are probably at least 5 years away from a resolution of what the boundaries of a couple of Colorado River mainstream reservations are, so I think litigation is not the answer.

There have been millions of dollars spent on legal fees and consulting fees and not one extra drop of water has been produced from the Columbia River that I know of, and not much in the way of the kind of infrastructure that the tribal representatives are talking about, so I don't think litigation is the answer, having been at it for over a quarter of a century, but on the question of Federal responsibilities to the tribes, it seems to me having worked with States and municipalities and public agencies that are fighting in Indian water rights disputes that I think there is a general consensus. I don't think there can be any dispute that the Federal Government has failed miserably in its trust obligation to the Indian tribes. For over 100 years it didn't protect the tribes' water rights, sat back and let the States and non-Indian users develop water rights under State law, thinking they were valid and secure.

The Supreme Court made it clear that they aren't. The question becomes how does the Federal Government now at this late date do equity to the tribes for 100 years of failed responsibility, and at the same time not take it out of the hides of what I view as innocent, non-Indian water users?

The non-Indians who developed water rights or hope to develop water rights, the States that have set up administrative systems to administer them were not at fault in my view. It is the Federal Government that has gotten us all into this mess. Somehow they have to get us out, and it is going to take wet water, as Secretary Smith says.

I think it is also going to take money. It is going to take money to the tribes if the full magnitude of their reserved rights aren't satisfied. It is going to take money I think equitably to non-Indian users who may have to be deprived of some of the water rights they thought were secure and on which they built, established economies, so the thing that I think has troubled and irritated the States, public agencies and individual users so much is that the problem is being rectified, primarily rectified by the Federal Government through litigation, the end result of which is usually that the tribes are made whole and in part at least by taking the water out of the hides of existing non-Indian water users.

I think Congress should face up to its failed responsibility, the failed responsibility of the Secretary, and devise a scheme that will recognize it was their inaction and malfeasance to say the least that got us all into this problem, and they ought to, the Federal Government as a whole, the Nation as a whole, and the Federal Treasury, ought to be where we are looking to solve a good deal of this problem and not visiting the sins of the Federal Government on non-Indian communities or on the Indian tribes.

I had to say that because there were no spokesmen here for the States or the non-Indian users to remind the Federal Government of how we got into this mess we are in.

Thanks.

Mr. TRUDELL. Thank you. Are there other questions?

Mr. NORDAUS. Mr. Chairman, I wonder if I could tell about a 3-minute story about—I am Robert Nordaus. I represent the Jicarilla Apache Tribe, and I have been representing a tribe for 27 years in various claims against the Government.

Back in 1971 the Bureau of Reclamation started diverting water through the San Juan Chamma River, the San Juan River Chamma project to the Rio Grande Basin. The Navajo River was running through the Jicarilla Apache Reservation, was the only source of supply for the reservation.

No project has ever been seriously considered for the tribe. When water began to be diverted through San Juan Chamma, the water flow in the Navajo River was cut in half. The tribe brought suit against the United States claiming that water was being diverted far in excess of the need of the users down river, particularly the city of Albuquerque.

After negotiations for about a year with Mr. Steve Reynolds of New Mexico, Secretary Kleppe, an agreement was reached that the Secretary would reserve 26,000 acre-feet to the tribe annually in perpetuity subject to feasibility of use on the reservation.

The Bureau of Indian Affairs and the Bureau of Reclamation were directed to cooperate in studies and if feasibility were found to initiate the project. That occurred in 1976. In 1983, the Bureau of Indian Affairs and the Bureau of Reclamation are still unable to agree as to the feasibility. The tribe because the Bureau of Reclamation dragged its feet, really failed in good faith to carry out the agreement, the tribe had to fund its own project which was supported by the BIA with some reservations, and we are still working on it. The tribe has had to initiate three lawsuits in order to preserve that 26,000 acre-feet of water.

The State of New Mexico and the Bureau of Reclamation published a list of projects in 1982 for use of all the remaining water on the San Juan River, and this 26,000 acre-feet was not on the published list. The tribe brought suit to enforce the contract, and last Friday after a defense by one of the non-Indian defendants which was more or less supported by the United States, the District Court in New Mexico denied motions to dismiss and held that we had standing to sue.

The moral of the story is that negotiations are fine, but we have to have active support on the top, Mr. Secretary, to see that these agreements are enforced, and no such agreements will be entered into by tribes unless they are performed in good faith by the Government and other parties.

We have another situation where it appears that in New Mexico the United States, the major adjudication on the San Juan River, that there may be, I think there has been a recommendation that although the Department of Justice recognized the conflict of interest and funded the tribes for their own attorneys because there are other Federal water involved, now there is a recommendation that the funding for the Jicarilla Apache Tribe, for its attorneys, be withdrawn because the tribe is able presumably to pay for its own attorneys.

On the other hand, about a year ago Congress authorized funding for non-Indian defendants in the *Amok* case, and as I understand that funding, there is no requirement that inability to pay of those non-Indian defendants be established.

I think the lesson is obvious, and I think we really need leadership at the top of the Bureau of Indian Affairs, Assistant Secretary and the Secretary, to resolve these conflicts, to see that their agreements are performed, or you will never negotiate settlement, and that funding is obtained for study, for legal defense, and for negotiation of settlements and projects, and there was a study made by the Western Governors, and this ad hoc group, of alternate methods of funding, and that is a source that should be studied very carefully.

Thank you.

Mr. TRUDELL. With the exception of Jerry's remarks, we really haven't heard from any people in the audience who represent the State perspective or industry.

Is there anybody that wants to pose questions to panelists?

Mr. REYNOLDS. Mr. Chairman, if I may—Steve Reynolds, New Mexico State engineer—I do want to make clear that the State of New Mexico did not publish a list showing any amount available for the Jicarilla Apache Tribe.

There was such a publication by the Bureau of Reclamation. It was the position of the State of New Mexico that we have no indication yet of a feasible project on the Jicarilla Apache Reservation, and that use on that reservation was given careful attention both in the original San Juan project study and after the agreement alluded to by Mr. Nordaus, by the Bureau of Reclamation and the Bureau of Indian Affairs. As I understand, those studies are still going ahead. The State before taking a position is awaiting the results.

Mr. TRUDELL. Additional questions?

Mr. BUSH. I have a question of Mr. Price. My name is Jim Bush of Phoenix, AZ. I am a panelist later representing the Western Regional Council.

The question I had with respect to better quality, does the Government feel that it has jurisdiction to impose water quality decisions, enforcement on Indian reservations both with respect to quality, with respect to surface water or any water quality regulations that might be adopted now or in legislation for ground water?

Mr. PRICE. As you are raising a question of Federal Indian law, I will defer to the panelists from the Solicitor's office and the Department of Justice.

Ms. WALKER. They are conferring.

Mr. MESHORER. The question is as I understand it who has jurisdiction over water quality matters.

Mr. **Bush**. If regulations are adopted by the Federal Government with respect to water quality, does the Federal Government have jurisdiction to impose those regulations on Indian reservations?

Mr. **Meshorer**. To begin with, it depends on whether or not there has been a State delegation by the Federal Government in the first instance.

Your question is timely because EPA, if I understand it correctly, is formulating a policy, and I am not aware of it—I want to be very careful I don't speak for you because, of course, I don't—where they are investigating and analyzing this problem to the extent of what is their jurisdiction, what is the jurisdiction of the Interior which has the primary responsibility to effectuate the trust relationship, but yet at the same time EPA has its statutory mandate to ensure compliance with the environmental laws of the Nation.

As you know, there have been problems, for example, in the Pacific Northwest with regard to environmental laws and treaty rights of various tribes. USD Washington is a good example where the Supreme Court in essence said that treaty rights of Indian nations can be subordinated to the extent that State environmental controls are administered evenhandedly to both the Indian and non-Indian community, but as I speak on these principles it is quite easy to realize that each situation must be decided on its own merits. That is, the treaty must be looked to, the particular allocation if any by the Federal Government, by EPA to State, the State attitude with regard to the delegation, and the implementation of that delegation if one has been effectuated, whether or not there is any litigation going on and the outcome of that litigation in so far as it might be a precedent in that particular jurisdiction, and the attitude of the tribe or tribes with regard to the entire matter.

There is a movement within the Federal family toward effectuating a policy, and I am not sure how far, how long that has gone. I know it has been initiated, and I would defer to EPA before I get myself in trouble.

Mr. **Price**. Perhaps I can add a little bit in the way of explaining the process we follow in dealing with the question of jurisdiction on Indian reservations. Ms. Walker.

Ms. **Walker**. I was just going to say I think if you separate the issues from one of whether the Federal Government under, the commerce clause would have the authority, however, I am not sure that is what your question is directed to. I thought perhaps it was more in light of the way the regulatory scheme is set up, in which case it would be EPA.

Mr. **Price**. I can speak to the process we follow. EPA's basic assumption is that our responsibilities cover the entire country, including Indian lands, under all of our statutes.

Typically, under our statutes, a State will ask EPA for delegation of a regulatory program, whether that program deals with air pollution, water pollution, whatever. We then inquire whether the State is asserting jurisdiction to regulate pollution sources on Indian reservations. If the State replies "yes," that its request for delegation includes Indian lands, we ask the State to demonstrate the legal basis for its jurisdiction to regulate behavior on Indian reservations.

In a few cases, a State has been able to demonstrate such jurisdiction, in which event we have delegated the program to the State government. A recent case in point would be the State of Oklahoma, which requested delegation of the EPA program regulating underground injection associated with oil and gas production in Oklahoma. We asked the State if its request for delegation was interested to cover Indian wells. The State replied that it proposed to regulate certain Indian wells, but not all such wells in Oklahoma. When we asked them for the basis of their jurisdiction under Federal Indian law, they showed us an express Federal statute in which Congress had granted power and authority to the State of Oklahoma to regulate oil and gas production from the wells of the Five Civilized Tribes in eastern Oklahoma.

We then delegated our underground injection control program to Oklahoma for non-Indian wells and for the wells of the Five Civilized Tribes where the State had successfully demonstrated that it had jurisdiction to enforce State law. For the rest of the Indian wells in Oklahoma, we did not delegate the program to the State. We retained the responsibility at the Federal level for regulating underground injection associated with those wells.

To summarize the process when a State requests EPA to delegate a program, we ask them if they are asserting jurisdiction over pollution sources on Indian lands. If the answer is "yes," we ask for a legal demonstration of jurisdiction. We then evaluate the States' legal assertion in light of Federal Indian law and delegate or not, depending on the law and the facts. If there is a question, we refer to Solicitor or the Department of the Interior and to the Department of Justice who are the final arbiters of questions of Federal Indian law in the executive branch.

Does that answer the question?

Mr. BUSH. Well, I think in part. Let's take the Safe Drinking Water Act. Now you have an authority to administer that act, EPA, do you not?

Mr. PRICE. Yes. We assert that we have that authority.

Mr. BUSH. Are you administering it on any Indian reservations?

Mr. PRICE. Yes.

Mr. BUSH. Both by reason of State asserting jurisdiction and in cases where you have investigated and determined the State's lack of jurisdiction, then it is enforced or applied by EPA?

Mr. PRICE. I should at this stage say that we have someone here from the Office of Drinking Water. Would you like to reply, Mr. Havinga? The question is one of historical fact dealing with your program.

Mr. BUSH. I picked out that specific act.

Mr. HAVINGA. That is true. EPA would have jurisdiction in a case where the State did not have jurisdiction.

Mr. PRICE. The concept of delegation is one in which EPA is given program responsibility for the entire country by Congress. Where delegation of that responsibility to another party is authorized by Congress, and that party can demonstrate that it has the wherewithall, including, of course, the basic jurisdictional authority to regulate, we can properly delegate the program to that party. Until it is delegated, however, it remains our responsibility.

Mr. **Trudell**. Any more questions? If not, before we conclude this first panel, are there any of the panelists that want to add or to detract from what they have said? If not, we should probably take about a 5-minute break so we can set up for the second panel.

[Whereupon, a brief recess was taken.]

Mr. **Trudell**. For the benefit of those who don't have a copy of the program, the topic for the second panel is on perspectives on ownership and control of Indian reserved water rights.

There are seven panelists, and so I think for the saving of time we should begin. I guess we will follow the same format as with panel 1, so we can give the panelists 5 minutes or so to make their comments and reserve some time for the questions and answers.

The first panelist is Mr. Leonard Atole, who is the president of the Jicarilla Apache Tribal Council.

STATEMENT OF LEONARD ATOLE, PRESIDENT, JICARILLA APACHE TRIBE

Mr. **Atole**. Good morning! Can everybody hear? Before I start on my presentation this morning, I would like to state my appreciation to Senator Malcolm Wallop and the Senate committee for conducting this workshop.

I think one of the major concerns that the Indian tribe has is that we have gone through so many Indian meetings, hearings, and other vitally important meetings with our Congress and the Bureau, and during one of the presentations the panelist mentioned this is a fine starting point, but I think we have had too many starting points. I think one of the concerns is that when will it end? That is the question I have.

The tribe has spent monies to do research, to do quite a bit of litigation, and I think it is time that some of these should be taken into consideration.

For the record, we did submit a statement which is quite lengthy, but for a matter of time limit I would like to just summarize the statement that has been presented for the record.

The survival of Indian tribes as economic units in the arid and semi-arid Western States requires the protection of their water rights. The importance of water to the Indians has been well stated by Senator Edward Kennedy:

> . . . to American Indians, land and water have always led the list of those matters deemed essential for both present livelihood and future survival, for Indians know that any threats to or diminution of their land and water rights may constitute threats to their very existence.

Indian water rights were recognized by the Supreme Court in the landmark case of *Winters* v. *United States,* 207 U.S. 564, 1908, from which the body of law known as the Winters doctrine developed.

The case held that Indians have prior rights to all water resources which arise upon, border, traverse, or underlie reservations, in the amount necessary to satisfy the present as well as future needs of Indian reservations.

Winters doctrine water rights are owned by Indian tribes. They are not the same as other Federal reserved rights. The United States is trustee for the tribes holding and protecting their water rights. The Winters doctrine rights are earlier and prior to the rights of non-Indian users, and they are not limited to the amounts actively put to use by the tribe but are dependent upon the future needs of the tribe.

The doctrine of, quote, prior appropriation, quote, does not apply to Indian water rights. The Winters doctrine water rights are not subject to appropriation or control by the States. The amount of water reserved under the Winters doctrine was the amount necessary to meet the Indians,' quote, present and future water requirements, unquote. The standard of measurement to be used in determining Indian water rights is the amount of water necessary to irrigate all practicably irrigable acreage on the reservation.

Now the importance of water to Indians cannot be overemphasized. Survival of the American Indian is geared directly to the land base and development of tribal resources. Non-Indians move to new locations when resources are exhausted. Not so the Indians. Many tribes have irrigated land for thousands of years or more. Indians in the Gila and Salt River Valley irrigate over some 140,000 acres; over 2,000 years ago they diverted water by means of channels, canals, even now recognized as important engineering accomplishments. Farming is the basic industry for many Indian communities, and for many the only means of income and subsistence available to the Indian people.

The following principles govern Indian ownership and control of water resources. First, the tribes own the full and irrigable rights to water resources. They also have the authority and jurisdiction to allocate, administer and regulate the application and use of these water resources arising on, under, and near their reservations. Title to these resources, includes ground water as well as surface water.

Second, like any other privately owned rights, there should be no limits placed on the marketing of water rights where water rights for tribes have been adjudicated and quantified.

Third, water resource information gathered by agencies of the Federal Government in its trust capacity is not public information since these water rights are privately owned rights.

Fourth, the Jicarilla Apache Tribal Council agrees with the statement of position of the ad hoc committee working group on Indian reserved water rights representing the Western Governors Association, the Western Regional Council, the National Congress of American Indians, the Council of Energy Resource Tribes, and Native American Rights Funding.

It is the position of that group that joint efforts can be negotiated, can negotiate water settlements that will be in the interests of all affected parties—tribal, State, Federal Government, as well as the private sector, but no such settlements can be made unless there is full understanding of the principle of ownership and control of Indian water rights. Each tribe must make its own decision whether it negotiates.

Fifth, since tribes are owners or have beneficial interest in water rights, any negotiated settlement must be concensual. Tribal government should be fully informed when negotiating. Any settlement approved by the tribal government must also be approved by the tribal referendum. In negotiation of settlement, all parties must recognize the tribal position of full ownership and control of adjudicated water rights.

Sixth, again consistent with the doctrine that the tribes own the beneficial interest in water rights, it is the right of each tribe to determine whether or not to negotiate.

Seventh, in view of shortage of budgeted funds, other alternatives for financing water studies and projects outside of current appropriations should be studied carefully in obtaining objective fulfillment of Federal responsibility to tribes and non-Indians in settling water disputes.

Eighth, as in our case with the 26,000 acre-feet agreement, water has to remain reserved while the project is studied and implemented.

At this time, my appreciation again goes to Senator Malcolm Wallop and the committee for allowing me to be on this panel.

Thank you.

[The prepared statement of Mr. Atole follows:]

PERSPECTIVES ON OWNERSHIP & CONTROL OF INDIAN RESERVED WATER RIGHTS

STATEMENT OF LEONARD ATOLE

President of the Jicarilla Apache Tribe,
Member of Executive Committee,
The Council of Energy Resource Tribes

Statement Made on Behalf of the Jicarilla Apache Tribe
And The Council of Energy Resource Tribes

For the Workshop on Indian Reserved Water Rights,
Subcommittee on Public Lands and Reserved Water
of the Senate Committee on Enery and Natural Resources

Review of Indian Water Rights Doctrine

The survival of Indian tribes as economic units in the arid and semi-arid western states requires the protection of their water rights. The importance of water to the Indians has been well stated by Senator Edward Kennedy.

> (to) American Indians, land and water have always led the list of those matters deemed essential for both present livelihood and future survival. For Indians know that any threats to or diminution of their land and water rights may constitute threats to their very existence.

Indian water rights were recognized by the Supreme Court in the landmark case of Winters v. United States, 207 U.S. 564 (1908), from which the body of law commonly referred to as the Winters Doctrine developed. The case held that Indians have prior and paramount rights to all water resources which arise upon, border, traverse, or underlie reservations, in the amount necessary to satisfy the present as well as future needs of Indian reservations.

Winters Doctrine water rights are owned by the Indian tribes and should not be confused with other federally reserved rights. The United States is trustee for the tribes holding and protecting their water rights. The Supreme Court in the Winters case set forth the doctrine as follows:

> The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrrigation, were practically value-less. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government.

The Court rejected the contention that these rights were given up by the Indians. The Court said that rights to use of water in the western states are interests in real property; that the doctrine of "prior appropriation" and the amount of water actually put to use and the date of use are irrelevant with respect to Indian water rights. These rights generally predate those of non-Indian users and they are not limited to the amounts actually put to use but are dependent upon the future needs of the tribes.

The priority date of Indian water rights may depend on whether the reservation in question was created by treaty or executive order. Where a reservation was established by treaty, as in the Winters case, the tribes impliedly reserve the right to all water necessary to develop their reservations fully, and arguably these rights date from time immemorial. With respect to Executive Order reservations, where title was returned from the United States to the Indians, the priority dates under the Winters Doctrine are determined as of the date the reservation was created. The rights reserved under treaties or created by Executive Order when reservations were set aside, have equal dignity and are not subject to appropriation by the states.

The Court's have established the criteria governing the amount of water which may be reserved by Indian tribes. In United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956), the Court of Appeals for the Ninth Circuit stated that the amount of waters reserved and held was that necessary to meet the Indians' "present and future water requirements". In Conrad Investment Co. v. United States, 104 F.2d 334 (1939), the Ninth Circuit held that the Blackfeet Tribe in Montana possessed water rights in a river bordering its reservation in amounts sufficient to meet their future needs of irrigation and other useful purposes. In Arizona v. California, 373 U.S. 546 (1963), the Supreme Court reaffirmed the Winters Doctrine and held that the standard of measurement to be used in determining Indian water rights should be the amount of water necessary to irrigate all of the practicably irrigable acreage on the reservation.

The Extent of Water Rights is Measured by the Future Requirements of Indian Communities.

In the Ahtanum case, the Court said: "This brings us to a discussion of the question of quantum of waters reserved. It is obvious that the quantum is not measured by the use being made at the time the treaty reservation was made." 236 F.2d at 326. The Court also said: "The reservation was not merely for present but for future use. Any other construction of the rule in the Winters case would be wholly unreasonable."

The Ninth Circuit in Conrad Investment Company case, explained the basic reasons for the Winters Doctrine.

> The lands within these reservations are dry and arid, and require the diversion of waters from the streams to make them productive and suitable for agriculture, stock raising, and domestic purposes. What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the Government to reserve whatever water of Birch Creek may be reasonably necessary, not only for present uses, but for

> future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters case.

Thus, the following aspects of Winters Doctrine rights to the use of water are apparent in statements from all the cases:

(a) There is a great need for water;

(b) The need is for present and future Indian requirements; and

(c) The intent evidenced in the treaties and executive orders setting aside reservations was that Indian reservations are to be continuing, viable, economic communities utilizing the necessary quantities of water to achieve those precise and most desireable ends.

Economic Development Through Utilization of Water Resources

The importance of water to tribal existence cannot be overemphasized. Survival for the American Indian boils down to the relationship it bears to the land to which he has been confined. White Americans have been able to move to new locations when resources were exhausted. Not so with the Indians - maintenance of viable tribal structures and cultures is geared directly to the land base and the development and utilization of their resources. Many tribes have irrigated lands for 1,000 years or more. The Hohokam in the Gila and Salt River Valleys irrigated some 140,000 acres over 2,000 years ago. They diverted water by means of canals which are even now recognized as highly refined engineering accomplishments. They demonstrated the need for economic development which they undertook as a means for survival. Similarly, the Pueblos of the Rio Grande Valley adjusted to their desert environment by using water to promote agricultural development. In the Great Colorado Valley, early explorers first encountered Indians engaged in irrigation to raise their crops. Lieutenant Ives in an 1858 report of explorations on the Colorado River reports the Quechan Indians irrigated crops stated as follows:

> It is somewhat remarkable that these Indians should thrive so well upon the diet to which they are compelled to adhere. There is no game in the valley. The fish are scarce and of inferior quality. They subsist almost exclusively upon beans and corn, with occasional watermelons and pumpkins, and are as fine a race, physically, as there is in existence.

Irrigated farming is the basic industry for many Indian communities, and for many, the only means of income available to the Indian people.

Jurisdiction of State and Tribal Courts

The question of jurisdiction of state versus federal courts in Indian water rights cases is beyond the scope of this paper. It should be remembered, however, that state courts apply federal law, including the Winters Doctrine, in these cases, and the final decision in these cases are generally handed down by the United States Supreme Court.

Final Report of the Indian Policy Review Commission

The Indian Policy Review Commission composed of Senators and Congressmen and chaired by Senator James Abourezk of South Dakota, submitted a report to Congress May 17, 1977, and made the following recommendations:

> The Commission recommends that:
>
> The Secretary of Interior allow the tribes having legal rights over water to develop their own water codes designed to regulate all forms of water usage.
>
> Congress enact legislation to provide for an Indian trust impact statement (as outlined in trust seciton of this report) any time Federal or State projects affect Indian water resources.
>
> The Secretary and the Bureau of Indian Affairs take the following actions or provide tribes with the financial capability to:
>
> 1. Inventory all tribal water resources.
>
> 2. Complete land use surveys particularly to determine lands which are irrigable or which can use water for other beneficial uses.
>
> 3. Conduct adequate engineering studies of the Indian water resources necessary for litigation.
>
> 4. Make available to the tribes funds to conduct legal and engineering research regarding particular water resources and to proceed with litigation where necessary.
>
> 5. Congress investigate litigation in the San Juan River Basin, the Rio Grande Basin, and the Colorado River Basin, and it likewise investigate the Walton cases, the Bel Bay case, and the Big Horn case to ascertain the scope of Federal conflicts of interest.
>
> 6. Congress amend 42 U.S.C. 666 known as the McCarran admendment to specifically exclude Indian water rights from its provisions.
>
> 7. The Secretary of the Interior direct the BIA to work with Indian tribes and the Bureau of Reclamation to (1) identify those Indian lands served by BIA irrigation projects which would most benefit from IMS; and (2) plan and provide guidance to implement IMS on those lands.

5

President Carter's Ten Year Plan For Review of Indian Water Claims.

President Carter, in a Water Policy Message delivered June 6, 1978 and a July 12, 1978 memorandum on federal Indian reserved water rights, directed the Bureau of Indian Affairs to:

> Develop and submit a plan for the review of Indian water claims to be conducted within the next ten years. The plan will include the development of technical criteria for the classification of Indian lands which reflect and make allowance for water use associated with the maintenance of a permanent tribal homeland.

The plan involved an assessment of Indian tribal water resources and future water requirements conducted in an orderly manner over a ten year period. The scope of work estimated the number of plans to be included and the estimated cost of the assessment at around $143,000,000. The plan entailed a comprehensive study which would contain the information needed for the support of tribes' claims to rights to the use of water, both for the present and foreseeable future. The primary purpose of the plan was stated to be that of preparing tribes for negotiated water claim settlements so that negotiations could be expeditiously pursued where desired by tribal leaders. It was stated that judicial resolution of water rights question is a time-consuming and costly process. It was stated that delay in settling water claims in some areas could lead to erosion of Indian water rights. The plan was stated to be designed to contribute to the solution of these problems.

The following assumptions and criteria for the plan were announced:

1. Each reservation review will entail the collection and development of data sufficient to enable the tribe to make an informed assessment of its present and future water requirements. Generally, appraisal level studies will be conducted. Unique problems will, on occasion, require more detailed study. Appraisal level studies in this context are defined as brief preliminary studies to identify and document for Indian tribes reasonable current and future needs for water.

   These studies will also provide tribal leaders with meaningful guidelines for future development alternatives. The appraisal level studies will use secondary data sources and approximating techniques where possible. Heavy reliance will be placed on professional judgment in developing information on problems, needs and alternative solutions in close consulation with tribal leaders.

2. Planning will consider water for all beneficial purposes. A long term, growth-oriented, Indian self-sufficiency demands consideration of the entire spectrum of water uses and economic activity to make "the maintenance of a permanent tribal homeland" a meaningful term.

3. Existing or new water adjudication cases will not impede the progress although it could change priorities.

4. Required funding will be requested at a rate to permit completion scheduled within the specified 10 years.

5. On-going water development funding will continue and not be contingent upon completion of the plan described herein. The plan should, however, provide the impetus and support for increased Federal developmental dollars. Opportunities for funding assistance in development could change priorities in the schedule.

6. Work completed or under way (water resource inventories funded by BIA rights protection, for example) will be evaluated first and utilized where acceptable.

At an address in Albuquerque in 1978, Forrest Gerard, then Assistant Secretary of Indian Affairs of the Department of Interior, discussed the President's plan. He stated that he believed the administration had developed a water policy which he felt would give the Indian tribes the unique opportunity to protect their water rights through use. He said that the amount of wet water on Indian lands should be increased dramatically through Indian control.

He stated as follows:

> First, the President favors negotiation rather than litigation as a means to settle water disputes between Indians and non-Indians. Secondly, if disputes cannot be settled by negotiation, the President favors adjudication of Indian rights in federal rather than state court. Third, the President has directed the BIA to prepare a ten-year plan for the review of Indian water claims. In connection with this plan, the Bureau has been directed to develop technical criteria to classify Indian lands which make allowance for water use associated with the maintenance of a permanent tribal homeland. Finally, all federal water development agencies under the leadership of BIA have been directed to develop special procedures to be used in evaluating project proposals for the development of Indian water resources. In addition, these agencies are to help increase Indian water development in conjunction with quantification of rights.

The National Congress of American Indians and the National Tribal Chairmens' Association objected to a number of points in the President's program.

The Tribal Chairmens Association, however, agreed that the administration should implement the immediate development of Indian water resources by making available at reservation level, a program in funding which would utilize surface and groundwater resources. The Indian tribes would benefit from the program of protecting, preserving, utilizing, conserving their water rights.

The tribes also stated that the tribal governments should be directly represented as voting members of national regional and interstate regulation and water policy planning bodies and commissions, including interstate compact commissions, interbasin commissions, river basin commissions and others.

An extremely important consideration to the tribal groups was the recognition of the concept that Indian tribes have jurisdiction as owners of full equitable title to lands and water rights, to control, administer and allocate water resources within their jurisdiction.

Conclusion

1. Because tribes own full and equitable title to their water resources, Indian tribes have the authority and jurisdiction to allocate, administer and regulate the application and use of water resources arising on, under and near their reservations. Title to these resources include groundwater, as well as surface water.

2. There should be no limits placed on the marketing of water where water rights of particular tribes have been adjudicated and quantified. Only in this manner can the beneficial use of the water by tribes be assured for the future.

3. Water resource information gathered by agencies of the federal government in its trust capacity is not public information, as Indian water rights are privately owned rights.

4. The Jicarilla Apache Tribe and the Council of Energy Resource Tribes agree with the statements of position of the Ad Hoc Working Group on Indian-reserved water rights representing the Western Governors Association, Western Regional Council, National Congress of American Indians, Council of Energy Resource Tribes and Native American Rights Fund. It is the position of that group that joint efforts can facilitate the consideration and implementation of consensual negotiated water settlements that would be in the interest of all affected parties - tribal, state, federal governments, as well as the private sector. No such settlements can be consummated unless there is a full understanding of the principles of ownership and control of the Indian water rights.

5. Moreover, it is unrealistic to anticipate negotiations in any cases if a tribe lacks hydrologic or other data that is essential to the negotiation process. The Department of Interior - BIA, should determine what remains to be done in assessing tribal water needs, conducting hydrologic studies and obtaining any other data which is necessary for negotiations in specific cases.

6. Commitments made by the Department of Interior to support specific tribal water projects or settlements must be honored.

7. The federal government must provide a leadership role in seeking a solution to Indian water claims. This includes appropriations to support the above activities, as well as reasonable appropriations for tribal water projects that may become a part of negotiated settlements.

8. It must be recognized that any negotiated settlements must be consensual with the fully-informed consent of tribal governments and should be approved by tribal referenda. No negotiations can be expected to be successful until water studies are completed.

9. Finally, it is the perogative of each tribe to determine whether or not to negotiate.

10. In view of the present state of the federal budget, it is suggested that alternative sources of funds for financing new water studies and projects be considered. In this connection, a research report submitted to the Western Regional Council, Western Governors Policy Office and Council of Energy Resource Tribes by H. Stuart Burness, September 28, 1983, sets forth various alternatives for financing new water studies and projects outside of current appropriations. These alternatives should be studied carefully and considered as an alternative to regular appropriations in fulfilling federal responsibility to tribes and others in settling water disputes.

Dated June 19, 1984

Leonard Atole, President
Jicarilla Apache Tribe

Mr. TRUDELL. Thank you. The second panelist is Gov. Dana Norris who is the governor of the Gila River Indian Community. Governor Norris.

STATEMENT OF DANA R. NORRIS, GOVERNOR, GILA RIVER INDIAN COMMUNITY

Governor Norris. Thank you very much, Mr. Chairman. Members of the committee, and fellow Indian leaders, our reservation is located generally south and east of the city of Phoenix in central Arizona.

The community is comprised of the Pima and Maricopa Tribes, and we have lived along the Gila River and Salt River for thousands of years.

In past centuries, as today, our economic base has depended upon agriculture. There are several concerns that I have with respect to this workshop and these hearings.

First, it is my understanding that Indian legislation is ordinarily initiated in the Senate Select Committee on Indian Affairs, and since Indian reserved water rights are unique and so crucial to tribes, any legislation developed should be first considered by the Senate Select Committee on Indian Affairs.

I think it is important to state at the onset that legislation involving Indian reserved water rights on a national scale is not only unwise but inevitably unfair. There is so much diversity between the tribes as to their water rights that even conceptually legislation could not begin to address the multitude of variations of Indian claims and rights. Legislation may be appropriate, but only in specific water basins affecting only specific tribes and reservations.

Even in the State of Arizona the nature of Indian water rights claims differs tremendously. Since water is such a scarce natural resource in Arizona, Indian claims to water are controversial, but much of the emotion and the rhetoric about Indian water rights is raised only by those interests who wish to control this scarce natural resource and benefit financially.

The Pimas and Maricopas having been actual users of waters from the Gila and Salt Rivers since time immemorial, and because of our actual beneficial use of water, we feel that we have the strongest claim to water of any water claimant in Arizona. Unfortunately, our reservation is downstream from the headwaters of these rivers and this geographical fact obviously has caused much difficulty.

Farming is the key to our economy, and farming is limited only by the amount of water available. Surveys conducted by the Soil Conservation Service indicate that approximately 266,000 acres on our reservation are arable and capable of being irrigated. Gila River Farms, a tribal enterprise, in any given year may farm 15,000 acres of that land.

In addition, individual Indian farmers are increasing their acreage yearly. In short, the more water available to Gila River, the greater our agricultural productivity will be.

When it is recognized that much agricultural land in the greater Phoenix area is being taken out of production, the potential for agricultural-related business at Gila River is obvious.

Our efforts to satisfy our water rights have taken a variety of forms. Litigation has been the primary method and will perhaps be the most satisfactory way in which our water rights will be satisfied, but we have always been open to negotiations with responsible parties and this policy will continue. Our most recent effort in negotiating, quantifying, and legislatively settling our water rights occurred in 1977 with Senate bill 905, when Senate bill 905 was introduced and hearings held before the Senate Select Committee on Indian Affairs, but at that time, the major interests in Arizona strongly opposed settlement. Perhaps this feeling has changed, but in our experience, settlement has not been good.

The Pimas and Maricopas today stand ready to meet and discuss possible ways to settle our claims to water. Each tribe may pursue different and even inconsistent ways to secure its water rights, but prior to entering into negotiations or litigation, technical studies must be completed before serious and responsible negotiations may begin. Unfortunately, most tribes are unable to afford these expensive engineering studies regarding their soil, water availability, water quality, and alternative sources of water. I am sure that every tribe represented here would be able to make good use of any moneys appropriated by Congress for such studies.

The Gila River Indian Community is organized pursuant to the Indian Reorganization Act of June 18, 1934, and it is recognized by the Secretary of the Interior as having authority to represent the confederated Pima-Maricopa Indian Tribes on the Gila River Reservation. The Gila River runs through the Gila River Indian Reservation, and the Gila River Indian Community has rights to the water of the Gila River from separate sources which rights are overlapping and noncumulative and form the basis for the Gila River Indian Community water rights. I will go one by one and conclude with this.

Aboriginal rights—from time immemorial, the Gila River Pima Indians have exclusively used and occupied the lands of the Middle Gila River and irrigated agricultural fields from the water of the Gila River. The Pima-Maricopa aboriginal right as exclusive use and occupancy of the lands and the waters now included in the Gila River Indian Reservation has never been established.

Prior appropriation rights—the arid western portion of the United States follows the prior appropriation doctrine. Under that doctrine, a person who appropriates water from a lake or a stream and applies it to a beneficial use acquires that vested right to continue to use the same amount of water, which right is superior to that of any subsequent appropriator.

Three, treaty guarantees—the Treaty of Guadalupe Hidalgo, a treaty between the nation of Minzko and the United States, guaranteed to us the use of the water of the Gila River.

Four, the Winters reserved rights; fifth, the CAP allocation by secretarial order—now these are addressed in the entirety of the record, for the record, that we have submitted today. There will be some corrections made to the written document at a later time.

Thank you very much, Mr. Chairman.

[The prepared statement of Governor Norris follows:]

STATEMENT OF
DANA R. NORRIS, SR.
GOVERNOR OF THE GILA RIVER INDIAN COMMUNITY
AT THE INDIAN RESERVED WATER RIGHTS WORKSHOP
SPONSORED BY THE
SUBCOMMITTEE ON PUBLIC LANDS AND RESERVED WATER
OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
JUNE 19, 1984
WASHINGTON, D.C.

Mr. Chairman, members of this Subcommittee, and fellow Indian leaders, I first want to express my appreciation for being afforded this opportunity to state ~~the~~ views of the Gila River Indian Community, Sacaton, Arizona.

Our Reservation is located generally south and east of Phoenix in south-central Arizona. The Community is comprised of the Pima and Maricopa Indian Tribes and we have lived along the Gila River and Salt River for thousands of years. In past centuries as today our economic base has depended upon agriculture.

There are several concerns that I have with respect to these hearings. First, it is my understanding that Indian legislation is ordinarily initiated in the Senate Select Committee on Indian Affairs. And since Indian Reserved Water Rights are unique and so crucial to Tribes, any legislation developed should first be considered by the Select Committee on Indian Affairs.

I think it important to state at the onset that legislation involving Indian Reserved Water Rights on a national scale is not only unwise but inevitably unfair. There is so much diversity between the Tribes as to their water rights that even conceptually, legislation could not begin to address the multitude of variations of Indian claims and rights. Legislation may be appropriate but only in specific water basins affecting only specific Tribes and Reservations.

Even in the State of Arizona the nature of Indian water rights claims differs tremendously. Since water is such a scarce natural resource in Arizona, Indian claims to water are controversial. But much of the emotion and rhetoric about Indian water rights is raised only by those interests who wish to control this scarce natural resource and benefit financially.

Pimas and Maricopas having been actual users of waters from the Gila and Salt River since time immemorial, and because of our actual beneficial use of water, we feel that we have the strongest claim to water of any water claimant in Arizona. Unfortunately, our Reservation is downstream from the headwaters of these rivers and this geographical fact obviously has caused us much difficulty.

Farming is the key to our economy and farming is limited only by the amount of water available. Surveys conducted by the Soil Conservation Service indicate that approximately 266,000 acres on our Reservation are arable and capable of being irrigated. Gila River Farms, a tribal enterprise, in a given year may farm 15,000 acres. In addition, individual Indian farmers are increasingly expanding their acreage. In short, the more water available to Gila River the greater our agricultural productivity will be. When it is recognized that much agricultural land in the greater Phoenix area is being taken out of production the potential for agricultural related business at Gila River is obvious.

Our efforts to satisfy our water rights have taken a variety of forms. Litigation has been the primary method and will perhaps be the most satisfactory way in which our water rights will be satisfied. But we have always been open to negotiations with responsible parties and this policy will continue. Our most recent effort in negotiating, quantifying, and legislatively settling our water rights occurred in 1977, when S. 905 was introduced and hearings held before the Senate Select Committee on Indian Affairs. But at that time the major interests, in Arizona strongly opposed settlement. Perhaps this feeling has changed but our experience in settlement has not been good. Pimas and Maricopas today stand ready to meet and discuss possible ways to settle our claims to water.

Each Tribe may pursue different and even inconsistent ways to secure its water rights. But prior to entering into negotiations or litigation technicals studies must be completed before serious and responsible negotiations may begin. Unfortunately most tribes are unable to afford these expensive engineering studies regarding generally soil, water availability, water quality, and alternative sources of water. I am sure every Tribe represented here would be able to make good use of any monies appropriated by Congress for such needed studies.

The Gila River Indian Community is organized pursuant to the Indian Reorganization Act of June 18, 1934 (25 U.S.C. 476) and is recognized by the Secretary of the Interior as having authority to represent the confederated Pima-Maricopa Indian Tribes on the Gila River Indian Reservation.

The Gila River runs through the Gila River Indian Reservation and the Gila River Indian Community has rights to the water of the Gila River from separate sources, which rights are overlapping and noncumulative.

1. Aboriginal rights. From time immemorial, the Gila River Pima Indians have exclusively used and occupied the lands of the middle Gila River Valley and irrigated their agricultural fields with the waters of the Gila River. The Pima-Maricopa aboriginal right as exclusive use and occupancy of the lands and the waters now included in the Gila River Indian Reservation has never been extinguished.

2. Prior appropriation rights. The arid western portion of the United States follows the prior appropriation doctrine. Under that doctrine a person who appropriates water from a lake or a stream and applies it to a beneficial use acquires a vested right to continue to use the same amount of water, which right is superior to that of any any subsequent appropriator.

In Arizona v. California, 283 U.S. 423, 459; 75 L. ED. 1154, 1168; 51 S.Ct. 522 (1931), the Supreme Court explained.

> To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the

> laws of the state where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water anually forever, subject only to the right of prior appropriations.

Pima and Maricopa Indians are the first appropriators of water from the Gila River and as such have the first vested rights therein.

At Hearings on H.R. 6707, making appropriations for the Department of the Interior for the fiscal year ending June 30, 1927, concerning the San Carlos Project and the Colorado River Compact, 69th Cong., 1st Sess., January 8, 1926, Hon. Carl Hayden of Arizona stated:

> [MR. HAYDEN.] The Pima Indians were the first appropriators of water on the Gila River . . . .
>
> MR. ARENTZ: Do the Pimas have the prior water rights?
>
> MR. HAYDEN. The gentleman from Nevada should know that it is conceded by everybody that the Pima Indians are the prior appropriators, not by years but centuries.
>
> MR. ARENTZ. So the white settlers come after the Pimas are served?

> MR. HAYDEN. Certainly.
>
> . . . .
>
> MR. LEATHERWOOD. Do I understand the gentleman to say that the rights of the Pima Indians are vested rights?
>
> MR. HAYDEN. The law of my State provides that the first in use shall be first in right, and there is no question but that the Pimas were the original appropriators on the Gila River and have a vested right to water.

3. Treaty guarantees. The Republic of Mexico considered the Pima Indians as citizens of Mexico. Pima-Maricopa land north of the Gila River was ceded by Mexico to the United States by the Treaty of Guadalupe Hidalgo, February 2, 1848 (9 Stat. 922), and that portion south of the Gila River by the Gadsden Treaty, December 30, 1853, (10 Stat. 1031). Article VIII of the Treaty of Guadalupe Hidalgo provided that:

> In the said territories property of every kind now belonging to Mexicans not established there shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract shall

> enjoy with respect to it guarantees fully ample as if the same belonged to citizens of the United States.

Article IX of the same treaty provided:

> Mexicans who, in the territories afore-said, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

Article V of the Gadsden Treaty incorporated by reference the provisions of the righth and ninth articles of the Treaty of Guadalupe Hidalgo and made applicable the same "rights of persons and property as the latter ceded area.

4. Winters (reserved rights) doctrine. In Winters v. United States, 207 U.S. 564, 52 L. Ed 340, 28 S.Ct. 207 (1908), the United States sued on behalf of the tribes of the Fort Belknap Indian Reservation to enjoin non-Indian settlers

from diverting water from the Milk River in Montana. The trial court granted the requested injunction and both the Ninth Circuit Court of Appeals and the Supreme Court affirmed. Although the agreement of May 1888, which resulted in the creation of the Fort Belknap Reservation did not expressly reserve water for the Indians, the Supreme Court concluded that both the United States and the Indians must have intended to reserve water. The Court stresses two factors: the reservation was part of a much larger tract which the Indins had the right to occupy; and the lands were arid and unable to support life without irrigation. Under the circumstances the Court was unwilling to believe that the Indians would deliberately surrender and the United States deliberately take away the means of irrigating the lands of the reservation. The Court therefore held that in creating the reservation the United States impliedly reserved to the tribes the right to divert water from the Milk River.

The Supreme Court again applied the Winters doctrine in Arizona v. California, 373 U.S. 546, 10 L. Ed. 542, 83 S. Ct. 1468 (1963), in action to apportion the waters of the lower Colorado River and its tributaries. The United States intervened in the suit claiming water for use on Indian reservations and other federal lands. In approving the report of the Special Master who had found that the United States had reserved water for irrigation of five reservations, the Court ruled that the Winters doctrine applied to a reservation created by Executive order. The Court then examined the evidence to determine whether there was an intent to reserve water (at 598-99):

> Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the reservations they were unaware that most of the lands were of the desert kind--hot, scorching sands--and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.

The Court concluded that the United States, in creating the reservation, intended to deal fairly with the Indians by reserving for them water from the Colorado River. These water rights were effective as of the time the reservations were created.

The Supreme Court enunciated the measure of the Indians' Winters doctrine rights and rejected the contention of Arizona that Winters doctrine rights should be measured by the "reasonably foreseeable needs" of the Indians, stating at 600:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservation and ruled that enough water was reserved to irrigate all the praticably irrigable acreage on the reservation.

Applying the Winters doctrine, the conclusion is inescapable that in creating the Gila River Reservation and in expanding it to its present boundaries the government intended to reserve for the Pima and Maricopa Indians not only the lands in the reservation but also sufficient waters from the Gila River and Salt River to irrigate all the practicably irrigable acreage of the reservation. The Reservation was carved out of a larger area which the Pima and Maricopa had the right to use and occupy. The lands of the reservation were arid; without irrigation they could not support Pimas and Maricopas. The Pimas and Maricopas were agricultural people who had, for hundreds of years, supported themselves by diverting water from the Gila River and applying it to their lands. The reservation was created for the purpose of protecting the Pima and Maricopa from anticipated encroachment by white settlers. In a letter dated November 4, 1858, Agent G. Bailely wrote Commissioner of Indian Affairs C. E. Mix (H.R. EXEC. DOC. No. 2, 35th Cong., 2d Sess. 557 (1858):

> But it is necessary to do more than conciliate these Indians by presents. They must be secured in the possession of their lands. Their richness and their advantageous location will excite the cupidity of a class of settlers not over nice in their regard for the rights of the Indians, and trespasses will be committed which will be resented and punished. Domestic in their habits, occupying fixed habitation, attached to the soil they and their ancestors have cultivated for ages, these are precisely the people who will least brook an invasion of their territorial rights.

Congress and the Executive were acting in good faith in creating and expanding the reservation and therefore intended to reserve both the lands of the reservation and water from the Gila and Salt River for Pima-Maricopa use. On April 28, 1859, Agent Sylvester Mowry wrote to the Commissioner of Indian Affairs urging that the survey of the Gila River Indian Reservation be implemented immediately. He said:

> The lands which the Pimas and Maricopas are to occupy under title from the General Government should be laid out and marked and

> bounded so there can be no excuse for infringing upon them . . . It should be laid out along the River on both sides extending so far back to secure their lands all the privilege of irrigation without fear of interruption in all time to come.

On October 17, 1859, Col. A. B. Grey notified Agent Mowry that the survey of the reservation had been completed. S. EXEC. DOC. No. 2, 36th Cong., 1st Sess. 726 (1860). He stated that the reservation

> includes all of their gardens or planting grounds upon the Gila or in the Valley,and gives them a great extent of water for their acequias, as well as being abundantly wooded for their purposes.

The Gila River Indian Community is entitled to sufficient water from the Gila River and other sources to irrigate all of the practicably irrigable acreage of the Gila River Indian Reservation.

5. The Central Arizona Project-Federal Augmentation of Water. In 1968 Congress authorized the Central Arizona Project (CAP) as part of the Colorado River Basin Project 43 U.S.C. §1501. et. seq. CAP will deliver water from the Colorado River to Central Arizona. In 1976, Secretary of the Interior Kleppe allocated 173,100 acre-feet yearly to the Gila River Indian Reservation. His order was modified in 1980 by Secretary of the Interior Andrus who raised the priority status

of Indian water but decided that Gila River should be forced to take effluent water as part of their CAP allocation.

The Community has refused to enter into a water delivery contract because of the forced effluent issue. Under both Secretary Andrus's Order and the Order of Secretary Watt the Community would be forced to take up to 20 percent of its allocation or 34,620 acre-feet per year up to 2005. After 2005 the Community may be forced to take up to 50 percent of its CAP water allocation or 86,550 acre feet. The concern of the Community is apparent as these are extremely large amounts of potentially harmful effluent water to be delivered to the Reservation.

Again the Secretarial decision was modified by Secretary Watt who added a condition that in water short years the allocation would be subject to a 25 percent reduction with the remaining 75 percent of the irrigation allocation on a priority basis with non-Indian municipal and industrial allocations. Since other Tribes are subject to a 10 percent reduction it is clear that Gila River is being unfairly punished because it did not choose to take effluent and enter into a water delivery contract for CAP water.

There is no doubt that if CAP water is delivered to our Reservation that this supplemental supply will help stabilize our water supply but will not resolve our water claims.

We are extremely concerned with the use of effluent water on our Reservation because we simply do not know of the effects this water will have on our ground water supply and land. There are many instances of pollution of groundwater from TCP or other toxic and harmful substances such as arsenic, cadmium, mercury, cyanide, and lead which are only now being discovered years after actual pollution took place. In addition Arizona has a poor record of maintaining its wastewater treatment plants and it is very difficult to predict the quality of effluent water which will be delivered to the Reservation.

Finally, there are an ever increasing number of plants using harmful heavy metals in the greater Phoenix area. These harmful heavy metals are left in their effluent despite pre-treatment ordinances or laws. The risks in taking effluent are too great and until there are greater assurances from the Department of the Interior a water delivery contract may not possible. I again thank you for this opportunity to present the views of the Gila River Indian Community. Today I have only outlined in a broad fashion our water claims and I leave resolution of the Community's specific claims to on-going litigation, negotiation, or even a legislative settlement.

Mr. TRUDELL. Thank you. *The fourth or third panelist is Rodney* Lewis, the general counsel for the Gila River Indian Community.

STATEMENT OF RODNEY B. LEWIS, GENERAL COUNSEL, GILA RIVER INDIAN COMMUNITY

Mr. LEWIS. I would like to make some remarks about what Governor Norris mentioned. It strikes me as unusual and interesting that we are here in Washington, DC, today, and there is such a contingent of people from Arizona, not only other Arizona Indian tribes, but also I notice on the agenda and in the audience Mr. Bush is here, John Kai, Al Schrago, speaking later on this panel, and it seems to me that perhaps we ought to get together in Arizona sometime and talk over some of these problems instead of airing them here at this workshop.

There is a lot of issues here which we aren't even concerned about. One problem which affects the Gila River as it does other Indian tribes is the role of the Federal Government, and I am glad to see Ken Smith here, and I am glad to see his commitment as a strong advocate within the Department of the Interior for Indian water rights.

We have a host of problems across the board with the Federal Government. The one problem currently facing us involves our allocation pursuant to the Central Arizona Project Act, so we have constant negotiations, constant fights with the Bureau of Reclamation and other entities within the Department of the Interior as we attempt to gain our proper share of the allocation in the form which we would like from Central Arizona Project, and for those of you who are not familiar with the State, it involves the river from the Colorado River part of the State of Arizona to Phoenix. The Gila River is a little in between Phoenix and Tucson and we are entitled to a share of that water.

One primary thrust of this workshop appears to be to encourage negotiations, but I think every tribe in this room and every attorney and every party realizes that we can't negotiate unless both parties are willing to sit down and listen, and this means that both parties have to fear losing something, and out of this total negotiation process compromises then come about, but a negotiation atmosphere can't be artificially imposed upon Indian tribes, and one person this morning I believe he mentioned that it is difficult to negotiate if you don't know exactly what you have, and that is one point as far as Gila River is concerned.

We certainly would like to have the assistance of the Federal Government, the Bureau of Indian Affairs, Department of the Interior in attempting to find out exactly what water is available, what the quality is, where did it come from, before we sit down with a State, Federal Government, private parties, to arrive at any kind of negotiated settlement, but both parties must be aware of what they have, what they can lose, before negotiations can take place, but it is not going to be done unless both parties honestly and in good faith come to the bargaining table.

I guess the last point I would like to make concerns the negotiations and the legislative settlement. Now tribes have entered into settlements which have been ratified and approved by the Department of the Interior and by Congress, but they are having difficulty now, and for us to enter into any kind of a settlement that is going to be approved by Congress it would be difficult for us to accept unless the settlement was enforceable, unless there was some specific action about actual water. We are concerned about wet water as opposed to paper rights water which you might get in the form of a treaty. That is our position.

There are a lot of difficulties. We are interested in sitting down with the Bureau, with Arizona, with interested parties in Arizona, and we would certainly like to work something out, but at the same time there are litigation efforts ongoing and perhaps that may be the best way to handle the water rights.

Mr. TRUDELL. Thank you for that. The fourth panelist is Mr. Craig Bell who is the executive director of the Western States Water Council.

STATEMENT OF CRAIG BELL, EXECUTIVE DIRECTOR, WESTERN STATES WATER COUNCIL

Mr. BELL. Thank you. I am pleased to be here. The council consists of representatives appointed by the Governors of 12 Western States. We deal with a broad spectrum of water policy issues, but I don't think there is a more important one than Indian water rights.

I have submitted to the subcommittee staff a report which we recently prepared for the Western Governors Association on this subject, that is, Indian water rights.* I have also submitted to them basically a summary of the principal conclusions and findings of that report, and I would like to briefly discuss what those findings and conclusions are, at least some of them, and hope that you might have an opportunity to review that report at some point.

First of all, as you know, water is a very scarce resource in the West. I think we need to deal first of all with that fact as we consider proposed solutions to this problem.

In our study we found that with the exception of a small section of North Dakota, average water use represents 80 percent of stream flow in the entire Western United States. In over half of that region, average water use actually exceeds stream flow, and in a dry year, average water use exceeds stream flow throughout the Western United States. When that happens, ground water must be used to supplement those surface flows.

In many cases, as a result, ground water mining occurs and serious problems are occurring related to overdraft, that is, where ground water is taken out in excess of the rate at which it could be replenished, so water is a scarce resource in the West, but despite that fact, the demands on that resource are growing. Population growth with its concommitant municipal, industrial and agricultural demands are the principal component of that increased demand on the resource.

The appropriation doctrine is the prevailing water rights doctrine in the West. It was engendered to protect existing uses essentially. In summarizing the attributes of that document, I think we can safely say in general the following is true.

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*See appendix.

First of all, the basis is a publicly defined beneficial use of water.

Second, it is normally defined in terms of specific quantity of water which can be used to define the nature of the use and the time of use. Those rights may be terminated by abandonment or forfeiture. Their priority is the day of the first beneficial use of water.

As I said, one of the most important characteristics of the appropriation doctrine as a whole is that it protects existing economies which have been established based on those uses, and I think it could be safely said that the West has been made inhabitable and economically productive because of the certainty which the appropriation doctrine provides.

In contrast to the appropriation doctrine, I think we can say the following about the Winters rights, and this will be somewhat redundant, but I think it is important to compare the two.

The basis of the Winters rights, Indian water rights, is not publicly defined beneficial use under State law, but rather we find its basis in the intent of Congress. Winters rights have rarely been stated in terms of specific quantity. The *Winters* case is more interested in establishing the right rather than the quantity, and there are still issues which need to be resolved before we really know what the standard is, what will be applicable in defining those quantities. They are not defined in terms of the Nation's use or the time of use. They are not terminated by abandonment or forfeiture, and their priority is not later than the date on which the reservation was created. In short, there are a great many differences between the Winters right and the appropriation right, and I think those differences account for much of the controversy which surrounds this issue.

Of all the questions that relate to this question of inadequate water rights, I think the one that has the most potential significance when it is finally answered is the one on quantity because potentially Indian water rights are substantial, even enormous, in the Western States, and they are largely unquantified. Now the unquantified nature of those rights represents the problems most of concern for Federal and State Governments, for Indians and non-Indians alike.

In the first place, it makes it difficult, sometimes impossible, for State water right demonstrators to deal with the administration of their water rights laws effectively. That is many States, for example, must hold applications for new water right permits where the land and water resources involve water which is within or near Indian reservations unless Indian water rights are determined because it is impossible essentially to know with certainty what water is available for those new appropriations under those circumstances.

Also construction of new projects can be substantially delayed because of the uncertainty surrounding the extent of the new water rights. For example, in Utah, the Bonneville industrial units have been delayed substantially with the increased cost because the affected tribes in the State have been unable to agree on the extent of Indian water rights in that area. Also White River Dam in the same State has been delayed because of the, at least in part because of the uncertainty surrounding the question of Indian water rights.

Tremendous Federal resources, as you look at past history, have been expended, time and money, in litigating these questions. Postponing the quantification of these Indian water rights would likely lead to increasing the cost when that issue finally is addressed. It needs to be taken care of and is going to cost a great deal more if we postpone quantification, and without guaranteed water supplies, it is difficult for Federal water planners to commit moneys for the construction of Indian water rights projects and irrigation facilities and other diversion of water.

Indian tribes as we well know are in a poor position to finance construction projects, and the lack of definition, the lack of certainty concerning the extent of their rights makes it that much more difficult for them to arrange for and get the proper financing for water resources for the tribes.

The fact that Indian water claims are largely unquantified creates significant problems for non-Indians. Non-Indians are presently using water pursuant to State granted water rights, largely without knowledge about the extent of Indian water rights. The early priority date of Indian water rights means that when such rights are established, they may well displace State-created water rights with later priorities, and as I mentioned before, the extent of these rights means that there could be substantial dislocation of non-Indian uses since the vast majority of all available water in the West is in use, as I earlier indicated, while very few Indian water rights have been quantified, so that is essentially my perspective on the scope of the problem.

I am looking forward to the panel on the proposed solutions this afternoon.

Mr. TRUDELL. Thank you. The fifth panelist is Mr. Shrago.

STATEMENT OF ALVIN H. SHRAGO, FIRM OF EVANS, KITCHEL & JENCKES

Mr. SHRAGO. Thank you. My name is Al Shrago. I am from Phoenix, AZ, and I would hope to be able in my 5 minutes of time to give you some insight as to the perspective of those persons who claim water rights created under State law.

I don't expect all of you in this room to agree with me, but I would hope that after you have had a chance to listen to my oral comments as well as to read my written comments which I hope would be available through the staff of the subcommittee that you will better appreciate the perspective that those persons who claim water rights created under State law have.

Just as Oliver Wendell Holmes remarked nearly a century ago that: "The life of the law has not been logic, it has been experience," That is also true of development of principles on Indian law. I think it was understandable that in 1908 the Supreme Court in the *Winters* case found it difficult to hold that Indians who had been confined by the Federal Government to a reservation that was a small settlement of their aboriginal lands had no water rights by which to sustain themselves.

Accordingly, the court held that the Indians were entitled to an amount of water which had been reserved by implication to fulfill the purposes for which the reservation had been created. It is a gross oversight that occurred on the part of congressional leaders, the executive department of this Government, for over 100 years when they were setting aside these Indian reservations by treaty, by statute, by Executive order. Although those documents referred explicitly to the lands which were being set aside, it said nothing of water, water without which the lands could not be put to any beneficial use whatsoever, water without which life itself cannot be sustained, so the Winters doctrine naturally emerged as an effort by the Supreme Court to redress what was in retrospect a gross oversight on the part of the Executive and congressional officials.

Unfortunately the Court in *Winters* did not define the nature of the right, nor did it set forth with any guidelines or specificity how much water had been reserved. The first such case to do so occurred in *Arizona* v. *California* in 1963. That is many years after the 1908 decision in *Winters*, and in that case the Court held that the Indian tribes, these five tribes along the Colorado River, were entitled to enough water to irrigate all the practicably irrigable acreage on the reservations. What constitutes practicably irrigable acreage is presently the subject of dispute in pending adjudications throughout the Western States.

The result in *Arizona* v. *California* was that five Indian tribes were allocated over 900,000 acre-feet of water. In fact, one tribe was allocated well over 100,000 acre-feet of water even though it had only one Indian family that inhabited the reservation. Another tribe was awarded water even though it at the time was totally uninhabited. Now that is a result which in central Arizona simply cannot withstand the test of experience or logic rather.

I would point out for those of you who are unfamiliar with Arizona that there are over 19 million acres of Indian lands in Arizona. On the other hand, there are only 2.8 million acre-feet of water available on an annual average dependable supply basis. Water duty in most of Arizona is acre-feet of water per acre of land for irrigation purposes. That varies slightly depending upon the location and depending upon the soil quality and depending upon the crops grown, but that is a general rough rule of thumb.

If only one-third of that practicably irrigable land, or if only one-third of that reservation land is practicably irrigable, then application of that 4.5 acre-feet per acre water duty would ostensibly entitle Indian tribes in central Arizona to more than 10 times the amount of water that exists on an average annual dependable supply basis.

Now obviously no amount of wishful thinking or imaginative implications as to congressional intentions can support a result which would dictate that certain entities have a right to more water than existed in the first place. In fact, perhaps the supreme irony in Arizona is that a strict application of the practicably irrigable acreage test will entitle a few tribes to all of the water and will deny any water at all not only to the millions of non-Indians who live in central Arizona, but to most of the other Indian reservations within the same watersheds which were created after the day of creation of the earlier Indian reservations. That is a result which I submit would be unfair to both Indians and non-Indians alike, and in recent years I think you have seen the experience aspect of former Justice Holmes' comment come into play with respect to application of the Winters doctrine.

We have seen two cases in particular—*United States* v. *New Mexico* in which the court now began to indicate that it is sensitive to claims for reserved water rights in the context where establishment of a reserved water right will amount to a gallon-for-gallon reduction in the amount of water that can be used by non-Indian appropriators.

That was not the case in *Arizona* v. *California.* That was not the case in Winters. Likewise the court in the *New Mexico* case has also enunciated a primarily use, secondary use test by which reserved water claims are to be measured, and I realize that it is not entirely settled whether that test applies to claims reserved for Indian purposes.

The point of my statement is merely to indicate that there is an increased sensitivity on the part of the court to application of the Winters doctrine to govern allocation of a scarce resource which is already fully utilized, and in *Arizona*'s case, overutilized.

The next case that I would like to discuss just briefly and I will end my remarks after discussing it, is the fishing rights case of *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association.* This was a fishing rights case, not a water rights case. However, Justice Stevens who wrote the majority opinion cited to the water rights decision, specifically *Winters* v. *the United States,* in *Arizona* v. *California,* for the proposition that the court in *Arizona* v. *California* was, quote, ordering apportionment of enough water to meet their sustenance and cultivation needs, unquote.

I don't think, with all due respect to the Supreme Court, that that is a fair interpretation of what was done in *Arizona* v. *California.* The court explicitly rejected in *Arizona* v. *California* the equitable apportionment argument that had been advanced by Arizona and the other States. It did not look to the sustenance and cultivation needs of the Indian tribes whose names were at issue. In fact, it specifically stated that what the reasonable needs of these tribes would be in future years to come was something that was not capable of objective determination and, therefore, the only fair and feasible way to determine water rights would be by way of measurement of the practicably irrigable acreage.

Additionally, Justice Stevens in the *Washington* case stated that the Court was vested—this is in that case which was a fishing rights case—was vested with discretion to devise some apportionment that assured that the Indians' reasonable livelihood needs would be met.

I think most of us are well aware that with the *Aikon* decision handed down by the Supreme Court in 1976, with the *San Carlos Tribe* decision that was recently decided this last term in 1983, that discretion to devise some apportionment to meet the Indians' reasonable livelihoods is going to be a discretion that is going to be exercised in the State courts where the majority of proceedings to determine water rights in the West are presently pending.

Justice Stevens noted also in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association,* and I quote:

> As in *Arizona* v. *California,* and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians, secure so much as, but not more than is necessary to provide the Indians with a livelihood, that is to say, moderate living.

I think that is the central principle that is going to be applied particularly in the context of central Arizona where there is insufficient water to meet the needs of any large water user, much less all water users combined. I think that it is a step in the right direction to discuss a negotiated resolution of this controversy simply because the litigation is going to drag on for many years. It is going to waste many millions of dollars. It is not going to produce a single drop of wet water. It is only going to result in increased tensions, increased distrust among the competing claimants, and ultimately disappointment.

I think that all of us, Indians and non-Indians alike, have so much more to gain by cooperating through negotiation and compromise rather than by litigating these claims.

Thank you.

[The prepared statement of Mr. Shrago follows:]

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BY EXPRESS MAIL

The Honorable Malcolm Wallop
United States Senate
Public Lands and Reserved
  Water Subcommittee
Committee on Energy and
  National Resources
Washington D.C. 20510

Re: June 19, 1984 Workshop on
Indian Reserved Water Rights

Dear Senator Wallop:

I thank you for inviting me to participate in the workshop on Indian Reserved Water Rights scheduled for June 19, 1984. It is my hope that the workshop will pave the way to greater understanding of an issue that is as complex as it is crucial to Indians and non-Indians alike. The following is my written statement (of which I am sending the requested 50 copies) for Panel No. 2, Perspectives on Ownership and Control of Indian Reserved Water Rights.

I. Emergence Of The Winters Doctrine.

The Indian water claims in the West are not in pursuance of any Congressional policy or statute, but instead, are premised upon the doctrine of federal reserved water rights which was created by the Supreme Court's now well-know decision in Winters v. United States, 207 U.S. 564 (1908). It would have understandably been difficult for any Court to have held that the United States did not intend for Indians which it had confined to reservations throughout the West to be entitled to any water at all. Accordingly, it held that the Indians of the Fort Belknap Indian Reservation in Montana were entitled to a sufficient amount of water, as of the date of creation of the reservation, to fulfill the purpose for which the reservation was created. It is obvious, then, that the so-called Winters doctrine was created by the courts to deal with a problem that neither the Congress nor the President (or his subordinates) even considered.

Most of the Indian reservations in Arizona were created in the 1860's. It is clear that at that time the Congress was well aware of the water allocation system, the doctrine of prior appropriation, that had emerged in and was being developed by the western states and territories. For example, the Congress enacted the Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392; the Mining Law of 1866, the Act of July 26, 1866, ch. 262, 14 Stat. 251; the Mining Law of 1872, Act of May 10, 1872, 17 Stat. 91; and the Desert Land Act of 1877, 43 U.S.C. § 321. All of these early enactments recognized in one way or another that water rights should be controlled by local law. Yet, when Indian reservations were being created by treaty, statute and executive order, no mention was ever made of water. The Winters doctrine naturally emerged as a judicial attempt to redress this gross oversight on the part of congressional and executive officials.

Much of the current confusion and conflict may be traced to the Winters decision itself, where the Supreme Court failed to discuss either the quantity of water reserved or the nature of the reserved water right. Rather, the Court suggested that the water had been reserved for "all their [the Indians'] beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization." 207 U.S. at 576.

The Supreme Court did not squarely address and apply the Winters doctrine until 1963 in Arizona v. California, 373 U.S. 546 (1963).[1] The Court held without analysis or discussion that Indian reservations created by executive order also have reserved water rights. 373 U.S. at 598. Previously, the Supreme Court had acknowledged significant differences between reservations created by executive order and reservations created by treaty or by statute. In Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942), the Supreme Court had unanimously held that executive order reservations, unlike those set aside by statute or by treaty, did not confer compensable property interests upon the resident Indians. The Court observed that:

> It is significant that the executive department consistently indicated its understanding that the rights and interests which the

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[1] Although the Winters doctrine was mentioned in United States v. Powers, 305 U.S. 527 (1939), the court neither defined nor applied the doctrine. Rather, the case was decided on a procedural holding that the United States, which was seeking to enjoin diversions of water by non-Indians who had acquired allotted Indian lands, had not shown a right to the requested relief.

> Indians enjoyed in executive order reservations were different from and less than their rights and interests in treaty or statute reservations.

316 U.S. at 317. It is difficult to understand how a vested Winters right could be created when the underlying reservation, by virtue of which the Winters right arose, did not itself give rise to a vested property right.

Nevertheless, the Court proceeded to award a water right of 905,496 acre-feet of reserved water annually to the five Colorado River tribes. This award did not even attempt to address allocation of a scarce natural resource in a fair, sensible manner. It allocated over 6% of the 15,000,000 acre-feet of water available to both the Upper Basin States (Colorado, New Mexico, Utah and Wyoming) and the Lower Basin States (Arizona, California and Nevada) to an area comprising only 0.22% of the land area within the watershed. It allocated this scarce resource to five tribes which had a population of approximately 3,340 persons,[2] in contrast to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming which had a population at that time in excess of 21 million persons. Indeed, there is no policy or legal justification for the award of 122,648 acre-feet of water annually to the Fort Mohave Indian Reservation, which was inhabited at that time by only one family and on which no more than 23 acres of land had ever been irrigated during the history of the Reservation. Transcript of Oral Argument at 329.

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[2] These figures include tribal members who did not even reside on the reservations. For example, although the Fort Mohave Tribe had 450 members, Special Master's Report at 85, only 1 Indian family lived on the reservation. Transcript of Proceedings at 14,157-14,157A. Although the Chemehuevi Tribe had 300 members, the reservation itself was uninhabited. Special Master's Report at 86.

To reach this result, the Supreme Court articulated that the Indian tribes were entitled to an amount of water sufficient to enable irrigation of all "practicably irrigable acreage" on the Reservation. The Court declined to apply the equitable apportionment doctrine, which it had earlier developed to determine the relative rights to waters of an interstate stream between sovereign states, each of which had its own set of laws defining water rights. Although the same policy considerations that justify equitable apportionment of conflicting water claims between states are at work when Indian reserved water rights conflict with water rights created under state law, the Court concluded that it would not apply the doctrine because "An Indian Reservation is not a State." 373 U.S. at 597. The Court also rejected, ostensibly on grounds of expediency, the suggestion that reserved water rights should be measured by the "reasonably foreseeable needs" of the Indians:

> Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' "reasonably foreseeable needs," which, in fact, means the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

373 U.S. at 600-601.

Although the practicably irrigable acreage test was labeled as the only fair and feasible way by which reserved water rights could be measured, its result is not only unfair and infeasible, but also impractical. In Arizona, for example, where there are approximately 19.4 million acres of Indian land, the practicably irrigable acreage test would ostensibly entitle the Indian tribes to more than ten times the amount of the annual dependable supply of water in the state even if only one-third of the reservation lands are "practicably irrigable."[3] Indeed, in Gila River Pima-Maricopa Indian Community v. United States, 684 F.2d 852 (Ct.Cl. 1982), the Court of Claims observed with palpable incredulity that the 1,007,076 acre-feet of water claimed by the Gila River Indian Community was "an amount somewhat greater than the entire flow of the Gila River except in several peak flood years." Id. at 864.

Such claims and results are devoid of any policy or legal justification. Indeed, the supreme irony is that application of the Winters doctrine as interpreted in Arizona v. California may serve to deny any water at all to some Indian tribes in Arizona whose dates of priority are junior to those of other tribes situated on the same watershed, which claim all of the available water. Such a rule is both unfair and infeasible to Indians and non-Indians alike.

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[3] The annual dependable supply of water in the State of Arizona is only 2.8 million acre-feet. Arizona Water Commission, Inventory of Resource and Uses: Phase 1 - Arizona State Water Plan, Summary 29 (July, 1975). The average annual water duty for arid lands in Arizona has been set at 4.59 acre-feet per acres. See United States v. Gila Valley Irr. Dist., Globe Equity No. 59 (D.Ariz. June 6, 1935).

II. Critical Refinement Of The Winters Doctrine

Justice Oliver Wendell Holmes remarked nearly a century ago that, "The life of the law has not been logic; it has been experience." Holmes, The Common Law, (1923). So it is, too, with the development of legal principles in the law of Indians and Indian affairs. Justice Frankfurther, for example, explained in Organized Village of Kake v. Egan, 369 U.S. 60 (1962), that a jurisdictional principle of Indian law articulated in 1832 by Chief Justice John Marshall "has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations." Id. at 72. The same process is presently underway with respect to the Winters doctrine of Indian reserved water rights.

A. Cappaert v. United States, 426 U.S. 128 (1976).

In Cappaert, the Supreme Court approved the issuance of an injunction against nearby pumping of underground water so as to protect the water level in Devil's Hole, a national monument that had been created in view of the scientific value of the unique species of desert fish (commonly known as Devil's Hole pupfish) that thrived in its water. Although some commentators have argued that the Supreme Court applied the Winters doctrine in this case to groundwater, the Court did no such thing. It expressly acknowledged that the doctrine had never been applied to groundwater, and it carefully noted that the water in Devil's Hole, which had been impliedly reserved, was surface water:

> No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater. Nevada argues that the implied reservation doctrine is limited to surface water. Here, however, the water in the pool is surface water.

426 U.S. at 142. In short, the Court held that the owner of reserved surface water rights may enjoin the pumping of underground waters which are "hydrologically connected" to the reserved surface waters.[4]

Significantly, the Supreme Court in _Cappaert_ appears to have rejected the notion that the molecules of the water itself are owned by the holder of a reserved water right. Rather, the holder is entitled only to the use of the water. This is apparent from the Court's clarification that the _Winters_ doctrine reserves "only that amount of water necessary to fulfill the purpose of the reservation, no more." 426 U.S. at 141. Moreover, the Court approved of the manner in which the district court had "tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole. . . ." _Id_. The "minimal need" language manifests an increasing appreciation by the Court of the necessity for allocating scarce natural resources in an efficient and fair manner.

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[4] The hydrological connection was not an issue in _Cappaert_, since the pumpers admitted it in their answer to the complaint.

B. United States v. New Mexico, 438 U.S. 696 (1978).

This 1978 decision represents the first case in which the Court critically analyzed the Winters doctrine and limited its application. The Court rejected the United States' assertion of a Winters right to a minimum instream flow for aesthetic, environmental, recreational and fish purposes in conjunction with the Gila National Forest.

To determine the reserved water rights issues, the Supreme Court extensively analyzed the historical development of national forests. The Court cautioned that claims for reserved water rights must be carefully examined:

> This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.

438 U.S. at 701-702. Justice Rehnquist also reasoned that a careful examination of reserved water claims was necessary in view of the highly disruptive effect that reserved water rights may have on state-created rights:

> When, as in the case of Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress

> and must be weighed in determing what, if any, water Congress reserved for use in the national forests.

438 U.S. at 705. Indeed, this is a point on which the Court was unanimous since the dissenters also agreed "that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law." 438 U.S. at 718 (Powell, J., dissenting).

The analysis in United States v. New Mexico stands in stark contrast to the manner in which the Court had previously examined claims to reserved water rights. First, in Arizona v. California, the Court had all but ignored the historical context in which the five Indian reservations and the other withdrawn lands had been set aside. Second, in earlier cases, the Court had never considered the impact that federal reserved water rights might have on state-created water rights. For example, in Winters, the Court was singularly unconcerned about the effect that the establishment of reserved rights on behalf of the Indians would have on the upstream homesteaders whose diversions the United States had sought to enjoin. Even in Cappaert, the Court had held that the impact that the establishment of federal reserved water rights would have on state water rights was essentially irrelevant. 426 U.S. at 138. In short, United States v. New Mexico is the first case in which the Supreme Court has manifested its sensitivity to the impact of federal reserved rights on water rights established under state law.

This new sensitivity has resulted in a detailed and critical analysis of claims to reserved water rights. The Court has enunciated a new primary purpose/secondary use standard by which federal reserved water rights are to be measured:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only available for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

438 U.S. at 702. Applying this new rule, the Court held that the establishment of national forests did not give rise to a reserved water right for recreation, wildlife preservation, or stockwatering purposes. Instead, both the legislative history and early administrative interpretations of the 1897 Organic Act of the Forest Service confirmed that national forests were authorized and established primarily to conserve water flows and to provide a continuous supply of timber. 438 U.S. at 707.

The four dissenting justices, in an opinion authoried by Justice Powell, argued that the national forests include the wildlife inhabiting them and that, consequently, the creation of the national forests must also give rise to a reserved water right sufficient to sustain the wildlife component:

> One may agree with the Court that Congress did not, by enactment of the Organic Administration Act of 1897, intend to authorize the creation of national forests simply to serve as wildlife preserves. But it does not follow from this that Congress did not consider wildlife to be a part of the forest that it wishes to "improve and protect" for future generations. It is inconceivable that Congress envisioned the forests it sought to preserve as including only inanimate components such as the timber and flora.

438 U.S. at 723-24. The dissent clarifies the primary purpose/secondary use test formulated by the majority. Water is not reserved for a permissible use that may have been merely contemplated at the time that the reservation was created. Rather, water may be reserved only for a use that was the primary motivating factor for the creation of the reservation.

The primary purpose/secondary use rule portends enormous ramifications for Indian claims to federal reserved water rights.[5] It is highly unlikely that the Congress or the President set aside the many vast reservations in the West principally so that the Indians could farm every practicably irrigable acre on them. At the time many Indian reservations were created in the West, the United States government was encouraging both the settlement and development of the West by non-Indians. The conflicts that ensued between the new non-Indian settlers and the Indian natives led the United States to set aside numerous areas of land for the exclusive use of the Indian natives. In that manner, conflicts between Indians and non-Indians would be minimized, and the Indians would have the exclusive use of the lands set aside to sustain themselves. Arguably, the primary purpose behind the creation of the reservations was to enable the Indians to maintain a reasonable standard of living. The agricultural development of every irrigable acre, however, like stockwatering and minimum instream water flows for the national forests, could have been at most only a permissible secondary use.

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[5] It has been suggested that United States v. New Mexico is limitted to only national forests, and that it is simply inapplicable to other federal reservations such as Indian reservations. See, e.g., Note, "Indian Reserved Water Rights: The Winters of Our Discontent," 88 Yale L.J. 1689, 1699 n.58 (1979). However, in Arizona v. California, the Supreme Court applied the Winters doctrine to non-Indian reservations without any suggestion that they were any different in that regard from Indian reservations. Moreover, Justice Rehnquist's general discussion in New Mexico about congressional deference to state water laws, the impact of reserved rights on state-created

C. Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979).

This 1979 decision is not a water rights case. It is a case of disputed fishing rights. However, it is likely to have a significant impact on further clarification of the Winters doctrine, not just because of the court's brief discus-

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footnote 5 cont'd.

water rights, and the careful examination of historical perspective are applicable to Winters claims generally, regardless of whether they may be associated with Indian reservations or other kinds of reservations. Indeed, in construing the McCarran Amendment as including Indian water rights, the Court observed in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), that there was no reason why Indian water rights should be treated any differently than other federal water rights.

sion of Indian water rights cases, but also because of the manner in which the Court analyzed competing claims by Indians and non-Indians to a scarce natural resource.

The Court first recognized the great importance of anadromous fish to the State of Washington, much in the same way that it had recognized the importance of state-created water rights in United States v. New Mexico. The Court then proceeded to note the importance of anadromous fish to the Indians at the time the relevant treaties were executed, some 125 years ago. In that regard, the Indians, who at that time constituted roughly 7,500 of the 10,000 people living in the area, depended heavily on the fish for their sustenance and for commercial purposes. The problem, then, as the majority perceived it, was to determine conflicting claims to a resource that had now become scarce:

> In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce.

443 U.S. at 669. This is precisely the problem presented by the conflicting claims between Indians and non-Indians to water. Unlike Winters v. United States, Arizona v. California, and Cappaert v. United States, the Court is no longer oblivious to the claims of non-Indians to scarce resources. Indeed, in this regard, Washington is entirely congruent with the unanimous admonition in United States v. New Mexico that the Winters doctrine "should be applied with sensitivity to its impact

upon those who have obtained water rights under state law. . . ." 438 U.S. at 718 (Powell, J., dissenting).

To support the district court's apportionment of anadromous fish between Indians and non-Indians, Justice Stevens compared the controversy over fishing rights to the controversy over water rights, which he correctly observed "were merely implicitly secured to the Indians by treaties that the Court enforced by ordering apportionment to the Indians of enough water to meet their sustenance and cultivation needs. Arizona v. California, . . . Winters v. United States." 443 U.S. at 684 (emphasis added). Later in the opinion, Justice Stevens made the following observation:

> The division arrived at by the District Court is also consistent with our earlier decisions concerning Indian treaty rights to scarce natural resources. In those cases, after determining that at the time of the treaties the resource involved was necessary to the Indians' welfare, the Court typically ordered a trial judge or special master, in his discretion, to devise some apportionment that assured that the Indians' reasonable livelihood needs would be met. Arizona v. California, . . . Winters, supra.

443 U.S. at 685-86 (emphasis added). The repeated reference to "apportionment" is extremely interesting. It will have a profound and fundamental impact on future determinations of Indian claims to federal reserved water rights. There was, of course, no apportionment in Arizona v. California and Winters v. United States. Indeed, in Arizona v. California, the Court had expressly rejected Arizona's argument for adoption of an

equitable apportionment of waters between Indians and non-Indians. To the contrary, the adoption in Arizona v. California of the "practicably irrigable acreage" test for determining water rights bore not even the slightest relationship to the "subsistence and cultivation needs" of the Indians on the five Colorado River reservations. Thus, the Supreme Court's willingness to speak in terms of "apportionment" of Indian water rights suggests that the "practicably irrigable acreage" test is not the criterion by which Indian water rights are to be measured -- the Court is increasingly looking to the uses to which scarce natural resources can be put by both Indians and non-Indians.

This conclusion is supported by the result in Washington. Although the district court's allocation to the Indians of fifty percent of the harvestable fish was upheld, Justice Stevens warned that the allocation was a ceiling which was subject only to downward adjustment:

> [W]hile the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter will, upon proper submissions to the District Court, be modified in response to changing circumstances. If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish.

443 U.S. at 686-87.

In so ruling, the Court implicitly disapproved of open-ended Indian entitlements to scarce resources that may be increased in future years. The fact that Indian entitlements may be decreased in the future years indicates that the Court is now sensitive to the amount of the particular natural resource that the Indians actually require for their livelihood; in other words, the Court is unwilling to permit windfall entitlements that exceed the Indians' reasonable livelihood needs:

> As in Arizona v. California, and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood -- that is to say, a moderate living.

443 U.S. at 686 (emphasis added).

The analysis of the reserved water rights in United States v. New Mexico and Cappaert v. United States and the analysis of the fishing rights in Washington v. Washington State Commercial Passenger Fishing Association are markedly different from the Court's prior analysis of reserved water rights in Winters v. United States and Arizona v. California. It is unlikely that the Supreme Court, now cognizant of the extraordinary conflicts between state-created water rights and federal reserved water rights, will continue to infer a congressional or presidential intention to reserve large quantities of water or other natural resources without an in-depth examination of the historical setting in which reservations allegedly giving rise to reserved water rights were created and the actual use to which the reserved water rights may be put.

D. The 1983 Supreme Court Term.

Three Indian water rights cases were heard and decided by the Supreme Court in the last term:

1. Arizona v. California, ___ U.S. ___, 75 L.Ed.2d 318 (1983);
2. Nevada v. United States, ___ U.S. ___, 77 L.Ed.2d 509 (1983); and
3. Arizona v. San Carlos Apache Tribe, ___ U.S. ___, 77 L.Ed.2d 837 (1983).

Although each of these cases addressed only procedural issues, the manner in which each was decided manifests an increasingly critical view of the Supreme Court towards Indian reserved water rights.

In Arizona v. California, the Supreme Court refused to allow the five Colorado River Indian tribes, which had been awarded over 900,000 acre-feet of water in 1963, to increase their water entitlements as a result of determinations that their reservations were larger than the sizes considered by the Supreme Court in 1963. The Court emphasized that "Certainty of rights is particularly important with respect to water rights in the Western United States." 75 L.Ed.2d at 334. The Court also acknowledged that if relitigation were allowed, a Pandora's Box would be opened since the states had indicated "that the irrigable acreage standard itself should be reconsidered in light of our decisions in United States v. New Mexico and Washington v. Washington State Commercial Passenger Fishing Vessel Association. . . ." Id. at 337.

In Nevada v. United States, the Supreme Court, again stressing the need for certainty as to water rights, unanimously refused to allow the Pyramid Lake Indian Tribe to reopen a judicial decree in order to establish a right to sufficient water to maintain the fishery at Pyramid Lake.

In Arizona v. San Carlos Apache Tribe, ___ U.S. ___, 77 L.Ed.2d 837 (1983), the Supreme Court reiterated the policy preference under the McCarran Amendment, 43 U.S.C. § 666, for determination of all conflicting claims, including Indian claims, to water rights in general adjudication proceedings in state courts. It rejected numerous arguments as to why those determinations should not be permitted in the state courts. In view of this decision, there are general adjudication proceedings involving Indian claims to water rights presently pending in virtually every state in the West. Eventually, Indian water rights will be integrated with all other water rights and administered comprehensively under the jurisdiction of state courts.

III. Conclusion.

The determination of Indian claims to water will take place sooner or later. It will be accomplished sooner if the Congress addresses the issues and determines what amount of water should be set aside in order for the Indians to attain a moderate standard of living. It will be accomplished later if the Congress leaves these determinations to the courts. In that event, the cost of litigating the claims to final determinations will likely amount to many millions of dollars, which could more sensibly be spent on water resource enhancement projects for the benefit of all water users.

For these reasons, the Congress should give serious attention now to the resolution of Indian claims to water.

Very truly yours,

Alvin H. Shrago
For EVANS, KITCHEL & JENCKES, P.C.

AHS/cf

Mr. TRUDELL. Thank you. The final two panelists are representatives from two Federal agencies, so I would assume that you people want to interact, Interior and Justice.

STATEMENT OF HANK MESHORER, CHIEF, INDIAN RESOURCES SECTION, DEPARTMENT OF JUSTICE

Mr. MESHORER. Much of what I wanted to say Al stated quite effectively, and I agree with just about everything he said as to the analysis and outlook of the problem in general.

I would just add a few comments. The right is unique. It is totally coordinated. We have but one statute in the McCarren amendment, which has been litigated since its inception in 1952, and we in the Department really still don't know what it means, what it means in this particular session.

We have done fairly well when we do go to court on substantive matters. The most recent example would be the Wyoming adjudication. We have not done as well as we would like, but we have lost most of the battles on jurisdictional issues. In fact, I would have to say that to the extent that we are litigating now, and we are going to be litigating in State court, when we do litigate, we are going to get just about all that we asked for. I note that the price tag is unconscionable for these litigations. Justice spends approximately a million dollars per litigation. I know it is quite onerous on the State side and for private interests as well, but I do have hope in that this is the first time we are talking, all of us as a group, about other alternatives to litigation.

Since my business is litigation and that is all we have right now, I look upon our endeavor with hopeful but still realistic eyes. There are thousands of reasons why we won't reach agreement, unless we all want to, in which case we will.

I have to conclude that we will be in the State court in a 10- or 15-year adjudication where wet water will not be the result, but increased organization, a few private attorneys making a fairly good living off the litigation, but where neither side develops any tangible results. As we all know, when litigation begins, it starts like a snowball down a hill. At first it is fairly manageable, and it has a useful role if you are trying to resolve it with a carrot and stick attack on getting wet water.

After you get halfway down the hill that snowball develops its own initiative and the parties find they are no longer in control. The litigation can go its own route aside from any considerations of the parties who initiated it or joined the litigation later.

We are finding that the States are not content to allow the Federal Government to put its own case or in chief, but are appropriating money to present their own case. I think it is a wise move from a litigation viewpoint. But did we end up with? The judgmental views of two apparently sincere experts. You could analogize it to the two criminal cases where the psychiatric testimony would say the party is insane or sane, take your pick. We are no closer to the truth than we were when we began the litigation.

We have cases going in about every single Western State. Al mentioned the unarticulated element of equitable considerations in the allocation of water, and I agree with that, but that is a two-edged sword. To the extent you bring in equity, you get away from the prior appropriation motivation of certainty, and something we all have to recognize with regard to equity, and is that it can go either way, and if we are going to have litigation where it is going to be divided in a solid-like fashion, all the more reason to settle. Why litigate for 20 years to find out the judge is going to basically divide the baby as he sees fit based on the facts of the case and not on prior corporation principles of certainty and total use of water in order of priority?

I just want to end by saying I am glad we are all finally talking about the problem, and in talking about it, recognizing that we do have one.

Thank you.

Mr. TRUDELL. Thank you. Our final panelist is Paul Baird.

STATEMENT OF PAUL BAIRD, ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. BAIRD. Yes. The program states that the purpose of this panel is to discuss the origin, nature and scope of Indian reserved water rights from varying points of view.

I think it is important to set out the premise upon which the Department of the Interior proceeds in pursuing Indian water rights claims.

Most of the framework under which we operate has been constructed by the courts. However, the courts have not answered all the questions, and it has been necessary for us to intrepret or to extrapolate or to apply policy gloss to some of the principles that have been set out by the court's to determine how we should proceed in a particular case.

I will be very brief so that we do have some time left for discussion. First, what you have heard said all along is that under the Winters doctrine, at the creation of an Indian reservation, sufficient unappropriated water is reserved to fulfill the purposes for which the reservation was created. That is the basic premise of reserved water rights.

These reserved water rights have a priority date which is at least no later than the date on which the reservation was created. They are not based upon appropriation, and they are not lost by non-use.

If you are dealing with a reservation that was created for agricultural purposes, then under the holding in *Arizona* vs. *California,* the correct measure for determining the quantity of water which was reserved is practicably irrigable acreage. If, however, maintenance of hunting and/or fishing activity was a purpose for which the reservation was established, then sufficient quantities of water for minimum instream flows which may be required to sustain the hunting and fishing of the tribe are also reserved under the Winters doctrine.

The Supreme Court to my knowledge has not addressed this issue. There are several cases out of the ninth circuit, however, which have recognized reserved water rights for hunting and fishing purposes, most recently *U.S.* vs. *Adair,* and also the *Colville* vs. *Walton* case.

We believe that water may also be quantified with a reserved priority for other legitimate purposes such as municipal use, industrial use, mining, and stock watering on the reservation. To my knowledge, there haven't been any courts to date that have recognized these uses, but I think under appropriate circumstances they could be claimed.

Finally, and perhaps most controversially, we are of the position that once a reservation's water rights have been quantified, then the tribe may apply the water to any beneficial use, and indeed might sell a portion of the water for use off reservation until such time as it becomes economically advantageous for the tribe to use the water on the reservation.

We have heard it said over and over again today that it doesn't do any good to have quantified water rights if you don't have any project so that you can make use of the water. It wouldn't do any good for a tribe to have a quantified water right if it just had to watch the water flow down the river because nobody would build irrigation canals or whatever was needed to make use of water on the reservation, and it is out of this that has grown our position that once the water has been quantified, the tribes may use it as they see fit.

I think I will close with that.

Mr. TRUDELL. Thank you, Paul. As Rod Lewis pointed out at the outset of his remarks, there are a number of people here from Arizona, and I think that to some extent the perspectives that have been set out focus a lot on Arizona, and I am sure there are other tribal leaders in the audience that are equally concerned about what is developing or is taking place in other States, so are there any tribal leaders here that would like to comment on the topic for this panel that are concerned about the Northwest?

Mr. Drennan. Mr. Chairman, my name is Anthony Drennan. I am chairman of the Colorado River Indian Tribes. I would like to ask a question.

You made a comment about the five reservations on the Colorado River, one reservation only having one family on that reservation.

Can you explain to me what reservation that was?

Mr. Shrago. Yes. The reservation was the Fort Mohave Tribe which had 450 members at the time, but only one Indian family lived on that reservation.

If you are interested, the evidence on that point can be found at pages 14157 and 14157A of the transcript of the proceedings in *Arizona* v. *California.*

Mr. Drennan. Fort Mohave happens to be in my group there, and I disagree with that.

Mr. Trudell. Ms. Jenkins?

Ms. Jenkins. Minerva Jenkins, chairperson for the Fort Mohave—we have approximately 740 members and we have about 50 families in Arizona, and we do have land in California and Nevada, and no one lives in Nevada, but that is the only reservation that doesn't have none of our tribe there yet.

Mr. Shrago. I think the reservation that had one or no Indians was the Chemehuevi, most of which was flooded and I think a few residents in that were there living in Los Angeles or something.

Ms. Kellywood. I am Irene Kellywood with Chemehuevi. I would like to say something about that remark. You say there was only one family living on the reservation at that time, but there was no reference made to the reasons why there were no tribal members living on that reservation at that time. There was no questions as to why or no reflections as to why the Indians were not using the water or why there were no people living there.

To me, this is a poor excuse for the nonwater use or the right to the water.

Mr. Shrago. I appreciate your statement, madam, and I did not mean to suggest that that by itself should be a standard by which the water rights are measured.

The only thing I am trying to point out is simply that we have a scarce resource. We don't have enough for everyone. In *Arizona* v. *California* over 900,000 acre-feet was allocated to five Indian reservations. There are plenty of reservations in central Arizona such as the Gila River Indian Community which is the largest reservation that is downstream on the Gila River. It is water needy. It is looking for water.

I am suggesting that had in retrospect there not been as much water allocated to the five Colorado River tribes, there would have been more water from the Colorado River available for allocation to water needy tribes in central Arizona on which there are thousands of residents.

I am not trying to suggest that *Arizona* v. *California* be revisited at this late stage, but I am only trying to suggest that in this process of allocating scarce resources, we look to the needs of all of the people in the affected regions and not single out just one entity or another. I think there needs to be conjunctive planning and comprehensive planning.

Mr. **Drennan**. We have aboriginal rights to our reservation, and I think that my question is then in the Phoenix and Tucson area, in the metropolitan areas, when you see thousands and thousands of homes being built, with each one of them having swimming pools, is this a beneficial use for that water, for great swimming pools, evaporation from those swimming pools and so forth, as far as the use of that water when we as Indian tribes are finally getting on our feet, using that water for our beneficial use as far as agricultural use and so forth? Is this what you are after as far as water in Arizona for a swimming pool?

Mr. **Shrago**. No, sir, it is not, and I am not here to defend the manner in which non-Indian citizens have used water in Arizona.

There has been a lack of management of Arizona resources for many years which recently has resulted in adoption of what I believe to be the most comprehensive ground water code in the country. It is an effort to bring Arizona's overdraft of ground water into balance. I am not suggesting that swimming pools is the best and highest use of water. I am not saying that no water should be used for swimming pools either because I believe the tourism industry is important to Arizona.

I think it is important, however, to point out that although you can point to swimming pools that may exist in the metropolitan Phoenix and Tucson areas, recent studies have indicated that use of water in Arizona for domestic and municipal purposes which would include use of water for swimming pools and watering lawns accounts for roughly only 7 percent of the total amount of water presently being consumed in Arizona; 89 percent or so of the water is used in agriculture and approximately 3 percent, a little over 3 percent of the water is used for industrial purposes.

Mr. **Boggs**. I am Dan Boggs, Black Feet. The gentleman and their comments on water, our water is a little bit different than Montana, but we have got a little more maybe, but I see some of the same problems, and I think one of our greatest problems is waste, not only Montana but in Arizona as well. A lot of it is waste, and the plight of the native Americans is ignored, and you refer to the Winters doctrine that, what did you say here? Under the Winters doctrine the Indian is not subject to termination of use or abandonment?

This is true, and I think it is a danged good insurance policy. I know because we are under quantification, Black Feet, not on water, but on land, but I can see where the same things would happen to water. If water is quantified, I am going to run short of cash and I am going to need some money for some reason or another, I have got something I can sell, I can borrow on. I can mortgage, or something else, and I lose that water, and this is why I think this is a good insurance policy by it not being subject to termination or abandonment because this does not just belong to me or the individual tribal member. It belongs to the whole tribe, so I can't dispose of it, and I think this is something that the non-Indian should be looking at especially now in cases where the water is being taken off and wasted and abused because we can look at the Colorado River, for instance, and see where this has been practiced in the past, and now everybody is worried about what they are going to do about where they are going to get a drink of water, and the tribes such as those downstream from

Tucson are fighting for the use of sewage because there is no more water available, so they are looking for a treating plant now so they can use this waste water.

Now is that what we are all going to end up with here? I think it could be very well on all reservations if we look at the systems, the way they are running now. We have got a lot of water up there, but I can show you Federal projects where there is a 90-percent waste. This isn't just a statement off of the top of my head. This is documented.

Now I think until the Federal Government can show where they can change their practices and show some accountability and somehow putting things together where we get away from this waste and show that there is going to be a use made of this water, I don't think we should be held under a new word that they put out of—what do they call it—practicably irrigable acreage.

We have had water studies or soil studies done on the reservation several years ago. Now they want to come back and redo these studies, and the first step in the studies that they propose is to cut our water by 75 percent.

Now the studies that were done were done by one of the most highly recognized firms in the country and still now they are being questioned, and the Federal Government wants to redo this just to steal the rest of the water from the Indians.

Mr. TRUDELL. Mr. Lewis?

Mr. LEWIS. I would like to correct the record here. Mr. Boggs mentioned that some people in Arizona were anxious. That is not the case. The Gila River is not anxious to take up from the water. That is one reason why we have not signed a water contract yet. We feel there are a lot of concerns about effluent; its quality dictates use on a reservation. In Arizona they used to call it harmful heavy metals in much of the effluent which comes out of the Greater Phoenix area. To illustrate the problem, under the latest award issued by the Secretary, as far as C&P water, we would be forced to take up maybe 20 percent of our allocation to the year 2005. That would be something like 34,620 acre-feet a year. That's a lot of water. After 2005 we could possibly be forced to take up to 86,550 acre-feet of our 173,000 acre-feet per year C&P allocation.

Those are large amounts of water, and it is difficult for us to think about those kinds of water coming down to the Gila River. That is one kind of problem.

Mr. Schrago raised the specter of possibly kind of a nice specter of Gila taking half the water supply in Arizona, and we would be saddled with that responsibility. That is unlikely, but it would place us in a very interesting situation, but in any event, I am not sure that is likely to happen.

We are interested in things like S. 905 which did not get off the ground back in 1977. That was the kind of bill that quantified or would have gone a long ways to quantify the amounts of water at the River, but also in that bill it had other kinds of benefits—additional power, moneys for water delivery systems, moneys for development of lands. Those are interesting kinds of points which I think make legislative settlement attractive. Those are the kind of things which the Gila River is interested in. If not, I suppose the litigation can take its course and probably will unless there is a lot of attitude change not only here in Congress but also in the Department of Interior and people in the State of Arizona.

Mr. TRUDELL. Other questions for any of the panelists or additional perspectives?

Mr. WHITE PLUME. My name is Burnett White Plume. I am from Wind River Indian Reservation in Wyoming and am on the Arapaho Business Council. I have a couple of questions.

One is for Mr. Bell and one is for Mr. Baird. The first one for Mr. Bell is we are talking about the cost of litigation being very high, and I am wondering if you have any quantifiable amount of dollars that you are willing to spend on negotiation? That is for Mr. Bell. You represent the Western States Council.

Mr. BELL. I'm afraid I can't be very responsive to that question. I don't know how much has been spent on litigation. Maybe Hank has some idea from the Federal perspective, but as far as the State is concerned, the Western States, I am not sure.

I have been convinced from our controversies through the years that it is a substantial amount of money. Many of the States are interested in negotiation and are willing to spend a substantial amount of money. I can't give you right now a specific figure on that either, but Montana, for example, the Reserved Rights Commission, which was established in that State, I think represents a substantial commitment to try and negotiate settlements with the tribes in that State.

Other States are taking different avenues, different approaches, but negotiation we see as a serious alternative and States are increasingly I think willing to make a financial commitment.

I can't give you a specific number or figure. Hank, do you have any idea how much we spent?

Mr. MESHORER. In the *Wind River* case we have spent about $1 million. That is the Justice Department, excluding salaries. That is mainly expert witnesses. The State had in a 1982 response to a letter we wrote them had spent around $8 million, and I think basically we came out ahead in substance of the matter.

I think the thrust of your question is—let me answer it this way—litigation is quite expensive. The DeConcini bill which is one alternative where private folks were given some money to pay for their litigation costs. I do not know the cost for each particular participant in a water rights litigation and I don't know where the money would come from for negotiation short of congressional approval.

As Ken Smith mentioned this morning, the Executive can ask for the money and that is one consideration. The other is whether Congress will give it to the Executive agency to use for negotiation, or I think more specifically development of a study to ascertain more particularly what exactly is the scope and extent of the particular water right, so it is really a question of asking Congress rather than the agencies that permit input, the use of the money once it has been appropriated.

Mr. TRUDELL. Do you have a second question?

Mr. WHITE PLUME. I guess it is kind of answered, but the second question I was going to ask was you talked about $1 million for that, our case in litigation on that, but I guess there would be no answer to my second question, but the question I was going to ask would be what would you say if you put a price tag on from the Government side of negotiations, what would you say would be spent on doing something with it, negotiating?

Mr. MESHORER. Gosh, that's a hard one to answer. When Justice spends money for litigation to determine the amount of money that we are going to claim, that amount is usually much more expensive than for negotiation because when you get ready for a case, for trial, you have got to prove your water right more or less to a higher standard than you would in a negotiation because you are trying to convince a judge in an adversarial context.

In negotiations I guess that is another reason why negotiation might be in the long run more beneficial for all parties. One doesn't necessarily have to prove the scope and extent of water right to the same level that you would in court.

So far our practice has been when we negotiate is not to spend the taxpayers' money to the extent we would if we were going to litigation, and so far when we realize that negotiation is stale then we gear up for trial and take that step when it is appropriate, but it is hard to put a price tag on what any particular water right would cost because each reservation has to be looked at on its own merits.

Does that answer the question?

Mr. TRUDELL. Roy?

Mr. LATTIN. I would like to address the Solicitor. I believe it is Mr. Baird. In your presentation you gave two pictures of why reservations were created. One was for agriculture and one was for hunting and fishing rights, and you as the Solicitor for the Department of the Interior should know that Indian reservations were created for our tribes to survive, and I have to put a lot into what does that mean coming from southern California, and what it means is what is survival today? It is economics, you know, on Indian reservations whether it is hunting and fishing or whether it is through agriculture, and when you are talking about water quantification for our tribes to survive, we have to quantify, you know, 100 percent of our reservation land practicably irrigable land for survival, and that is what it means.

When you talk about the year 2000 or 2025 for our reservation to survive, whether it is for hunting and fishing or for agriculture—it is economics, and you know that is the bottom line, and you as a solicitor working for the Department of the Interior, working with the Bureau of Indian Affairs, go back and read why Indian reservations were created, and they were created for us to survive.

Down in southern California survival is economics. We are surrounded with 14 million people, and for us to survive, it is going to be economics, and also, you know, to the attorney from Arizona, I believe his name is Mr. Schrago, we have gone to the Supreme Court case, *Mission* v. *Escadito and Vista.* I am sure you are aware of that, and you wrote innuendos which are exaggeration of facts which don't help in negotiations, stating where there is only one Indian tribe, and your center principle is the fact that those five Indian tribes got 500,000 acre feet of water and those kind of statements don't help in the negotiating process, and also to Mr. Bell, I think we as Indian people who are involved in water rights had better take a real good look what our opposition is all about.

You know, Mr. Bell knows exactly how much water is available in Western States, down to probably the last acre foot per year, and I think we as Indian people who are representing our tribes should take a real good look at that. That is our situation, and that is our opposition, and where we stand.

He knows exactly down to the acre foot how much water is available.

Mr. TRUDELL. We were scheduled to break, recess at 12:30 for lunch and reconvene at 1:30, so I think that we should do that. Prior to people leaving the room this afternoon, as Senator Wallop did at the outset of the program, he introduced Jerry Muys who will be facilitating as moderator this afternoon, so we will recess until 1:30 p.m.

[Whereupon, at 12:35 p.m., the workshop was recessed, to reconvene at 1:30 p.m. the same day.]

AFTERNOON SESSION

Mr. MUYS. Picking up where we left off this morning, we are going to talk about use and management of the water resource.

I want to take a minute to introduce the panelists to those of you who may not have the scorecard that has been passed out, but on my immediate right is Mr. Allen Pinkham of the Columbia River Inter-Tribal Fish Commission. To his right is Mr. Anthony Drennan, chairman, the Colorado River Indian Tribes, and Ms. Minerva Jenkins, chairperson of the Fort Mohave Tribe on the Colorado River, and Mr. James Steele, vice chairman, Confederate Salish and Kootenai of the Flathead Reservation.

On his right is Mr. Dan Decker, general counsel of the same tribes, and on the far right is Steve Reynolds, State engineer of New Mexico, and to my immediate left is Mr. John Kyl of the law firm of Jennings, Strouss, & Salmon—used to be and Crass I guess—in Arizona, representing the Salt River project.

On his left is Mr. Harold Furman, Deputy Assistant Secretary of the Interior for Water and Science. To his left is Mr. Stuart Shelton, Office of the General Counsel, Department of Agriculture. To his left is Mr. Ron Allen, assistant chief counsel of the Army Corps of Engineers. Next is Mr. Mike Dwyer, North Dakota Water Users Association, and on the far left, Ms. Harriet Sky, of the United Sioux Tribes.

We have got about an hour and a half for this panel, but I would like to ask all the panelists to try and keep their oral presentation as close to 5 minutes as possible so that we have some time for questions and some time for what I think is probably the most important panel, the panel 4, effort to talk about the proposed solutions. Where do we go from the mess we are in? So with that, let me turn it over to Mr. Pinkham to lead off, if you would please.

STATEMENT OF ALLEN PINKHAM, CHAIRMAN, COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, ACCOMPANIED BY TIM WAPATO, COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION

Mr. PINKHAM. Thank you. Good afternoon. I am Allen Pinkham. I am chairman of the Columbia River Inter-Tribal Fish Commission, and by way of introduction, the Inter-Tribe organization is composed of fish and wildlife subcommittees of the four Columbia River tribes—the Yakima, Kootenai, Mohave, and Nes Perze Tribe. By treaties dated 1855, the tribes reserved the right to take fish within their reservation boundaries and at their usual fishing places. Since time immemorial, salmon and steelhead have been as important to the Columbia River Indians as the air they breathe.

Today the Columbia River and the lives of our people are much different than they were in treaty times. Nevertheless, the treaty fishing right remains fundamental to our way of life—our cultures, our economies, and also our religion.

Basic to the needs of fish is the availability of productive habitat. As the U.S. Supreme Court has recognized, non-Indian fishermen may not crowd out the Indians from taking their fair share of fish. Likewise, non-Indians may not crowd the fishery resource out of existence. In this respect, a right of habitat quality, including instream flow protection, fish and treaty rights sufficient to support its existence. The right to fish would be no more than an empty promise without the right to safeguard the habitat that those fish require.

For the Columbia River Inter-Tribal Fish Commission, protection of the treaty right requires activities ranging from government-to-government coordination with the U.S. Army Corps of Engineers, to administrative review of forest management decisions.

The Columbia River and its tributaries contain the most highly developed hydroelectric system in the world. In 1980, Congress charged that anadromous fish would receive equitable treatment with the other purposes for which the Columbia River hydroelectric system is operated.

The Northwest Power Planning Council, established by Public Law 96-501, directed that downstream migrating salmon and steelhead would receive additional flows to assist in their journey to the ocean. These additional flows are to be provided under the guidance of two water budget managers, one representing the region's State and Federal fish and wildlife agencies, and the other representing the Columbia Basin Indian tribes.

The tribal water budget manager, an employee of the Inter-Tribe, actively manages hydroelectric project operations in coordi-Nation with the Corps of Engineers, the Bonneville Power Administration, and the Bureau of Reclamation. To date, the water budget is one of the greatest success stories of the Northwest Power Act and fisheries management for all citizens of the Pacific Northwest. In this manner, tribal water and fishing rights are being effectuated.

The Commission and its staff of biologists, engineers, public involvement and policy specialists, participate in a variety of management activities key to the survival of the fishery resource. For instance, recent Federal legislation has prompted a virtual gold rush of hydroelectric project applications. Many of these proposed projects would disrupt fisheries habitat through construction-related activities and reduced instream flows. Our best information indicates that approximately 200 hydroelectric project applications are pending in sections of the Columbia Basin used by anadromous fish.

This level of proposed developmental activity requires that we devote substantial time and resources to the protection of potentially affected fish habitat.

Even where dams already exist, proper fisheries management directs that these projects have adequate fish passage to permit salmon and steelhead to bypass hydroelectric turbines and irrigation canals on their downstream migration and to cross over the impoundment structures on their upstream migrations. Thus we coordinate with other management agencies to ensure that bypass conditions, including flow regimes, are sufficient to protect the resource.

Fisheries enhancement and mitigation activities necessitate many forms of stream restoration, including fencing riparian vegetation, removal of logjams, creation of spawning and rearing habitat with the use of wire gabions, and other devices, construction of fish hatcheries so that young fish may be outplanted to reseed underutilized habitat, and sufficient planning to ensure that these multifaceted activities proceed in a coordinated fashion.

The Columbia River Treaty tribes, individually and through the Columbia River Inter-Tribal Fish Commission, thus exercise their fishery management responsibilities over use of the Columbia Basin water resources. The complexity of this effort is almost overwhelming. However, the tribes are working together with all fisheries, interests in the Pacific Northwest to be able to protect their treaty rights and achieve results beneficial to the Indians and to the Nation as a whole.

Thank you.

Muys. Thank you, Chairman Pinkham. Didn't you ask this morning about taking a look at the cumulative impact of all these hydro projects?

Mr. Pinkham. Yes.

Mr. Muys. It seems to me that the FERC, or whatever the lead agency would be out there, is going to have to do an environmental impact statement on any of those proposals. That should, under the law, include a look at all the cumulative impact on particular reaches of the river, so I think that is your vehicle.

Mr. Pinkham. I think the study that is necessary to address the cumulative impact scenario is of such a magnitude I think that the FERC agency is reluctant to do that.

Mr. Muys. We have to lean on them, I guess.

Mr. Pinkham. Yes.

Mr. Muys. Mr. Drennan?

STATEMENT OF ANTHONY DRENNAN, SR., CHAIRMAN, COLORADO RIVER INDIAN TRIBES

Mr. Drennan. Thank you, Mr. Chairman. My name is Anthony Drennan, and I am chairman of the Colorado River Indian Tribes. The Colorado River Indian Tribes offer the following statement to the U.S. Senate Committee on Energy and Natural Resources, Indian Reserved Water Rights Workshop.

As a preface to our remarks, the Colorado River Indian Tribes would like to state that the diversity of natural conditions on reservations and the circumstances of the various tribes make any generalizations about the Indian water rights impossible. There are approximately 300 tribes in the United States. Each has a unique history and each has unique water rights and problems with regard to water. There are no simple or general solutions to these complex and diverse problems.

The circumstances existing on the Colorado River Indian Reservation do not exist elsewhere. The partial solutions we have reached with regard to our water problems will not be available to other tribes, nor would they necessarily be desirable.

We recognize this and ask that our remarks be considered in that light.

In order to fully understand the position of the Colorado River Indian Tribes on tribal water rights, it is necessary to briefly describe the history of the reservation and the background of the tribes' struggle to secure the rights to our water.

The Colorado River Indian Reservation consists of approximately 286,850 acres located on both the Arizona and California sides of the Colorado River. The Colorado River Valley has been since time immemorial continuously and exclusively claimed, owned, inhabited, used and occupied by the tribes of the Colorado River, and the tradition of our tribes teaches us that these lands were in fact given to the tribes by the Creator. The tribes of the Colorado River historically practiced flood plain agriculture similar to that practiced along the Nile River in Egypt. Prior to the construction of the Hoover and Parker Dams in the 1930's, the waters of the Colorado River regularly flooded the bottomlands of the river valley in late spring of each year. Traditional farming was accomplished by the planting of crops, including corn, beans, and squash, in exposed areas after the waters subsided. The crops were sustained by the moisture retained in the soil.

As part of the U.S. obligations under the Treaty of Guadalupe Hidalgo to prevent Indian invasions into the territory of Mexico, President Lincoln commenced negotiations with the tribes of the Colorado River for the establishment of a permanent reservation. The outcome of these negotiations was the act of March 3, 1865, establishing the Colorado River Indian Reservation. The agreement underlying the establishment of the reservation was that the tribes would confine themselves to the reservation in exchange for the United States in lieu of annuities or supplies, furnishing to the tribes an irrigation system which would enable them to adequately support themselves by farming.

An irrigation system was seen as the principal enticement to the Indians of the Colorado River to come and reside on the reservation. The irrigation system on the Colorado River Indian Reservation was the first Indian irrigation system ever approved and financed by the United States. The first appropriation for the system was in 1867. The amount of irrigated acreage on the reservation has steadily increased from 500 acres in 1900 to 37,897 acres in 1958, to the present-day figure of approximately 77,000 irrigated acres.

The close ties between irrigation systems on the Colorado River and the development of the Colorado River Indian Reservation give one indication of why the Supreme Court in *Arizona* v. *California* devised a quantification formula based on practicably irrigable acreage.

This brings us, of course, to the litigation that established the right of the Colorado River Indian Tribes to the water we receive today from the Colorado River. The basis of the reserved water rights doctrine is *Winters* v. *the United States.* In *Winters* the Supreme Court held that the right to use the water of the Milk River was impliedly reserved in the agreement establishing the Fort Belknap Reservation in Montana. The court found that the arid lands of the reservation were practically worthless without irrigation and that the Indians could not have intended to give up the means of irrigation of their reserved lands. *Winters* sets forth the principle that sufficient water is reserved to the tribes to fulfill the purposes for which a reservation is established.

Arizona v. *California* reaffirmed the Winters doctrine and went on to set forth a quantification formula to measure the water reserved for the reservation. The Supreme Court found that the proper standard for calculating the water rights of the tribes to be the practicably irrigable acreage existing within the boundaries of the reservation.

Arizona in 1952 brought the case of *Arizona* v. *California* under the original jurisdiction of the Supreme Court in order to establish Arizona's allocation of water from the Colorado River. The Colorado River Indian Tribes became involved in the case in 1953 when the United States intervened in the action on the behalf of the tribes along the Colorado River.

The United States successfully argued that the reserved rights doctrine entitled the river tribes to a share of Colorado River water with priority dating to the establishment of the reservations. Thus for the Colorado River Indian Tribes, the priority date of our allocation is 1865, and this is the earliest priority date on the river.

The 1964 Supreme Court decree in *Arizona* v. *California* awarded the Colorado River Indian Tribes 717,148 acre-feet of water. However, the 1964 decree did not end the case for the Colorado River Indian Tribes. Because a complete and accurate survey of the boundaries of the Colorado River Indian Reservation has never been accomplished, there is a continuing controversy as to the exact location of certain reservation boundaries.

The Supreme Court in 1964 declined to determine the boundaries of the reservation, and included a provision in the 1964 decree whereby the tribes' water allocation could be adjusted in the event the boundaries were finally determined.

In 1969, the Secretary of the Interior reimplemented a former survey and thus determined a portion of the western boundary of the reservation. Based on this boundary determination and on the fact that the United States failed to assert claims to certain irrigable lands in the earlier action, the Colorado River Indian Tribes also became involved in the second phase of the *Arizona* v. *California* litigation in 1978.

In the second phase of the litigation, the tribes sought the right to 262,861 acre-feet of additional water based on omitted and recently determined boundary lands. In 1983, the Supreme Court ruled that interests of finality prevented assertion of claims based on lands omitted by the United States in the earlier phase of the case, and that the tribes' water rights should not be increased to take into account the irrigable acreage existing within the new lands determined by the Secretary of the Interior to be within reservation boundaries because these boundaries were not finally determined. The court suggested that final determination might in some cases be judicial determination.

Our experience in litigation has taught us several lessons, the first of which is that the United States may not be the best representative of tribal claims in water litigation. In failing to press claims for all lands on the reservation, perhaps based on a tactical decision that smaller claims stood a better chance of being accepted, the United States has forever closed the tribes from obtaining water to which they are entitled under the legal principles applicable to the establishment of water rights.

Even the States recognized that the tribes would have been entitled to water from the lands omitted by the United States had those claims been made in the first phase of the litigation. Now there is no way to assert these claims.

Tribes must be wary that political pressures may be brought to bear on the United States in Indian water rights cases and that because of this pressure, the United States may not necessarily be as strong an advocate as the tribes themselves would be.

We also have found that certain legal theories which are beneficial to the tribes are not attractive to the United States. The foremost of these theories is the theory of the aboriginal title to land or waters. *Winters* v. *the United States* was based in large part on an aboriginal theory of water rights. The court saw water rights as rights retained by the tribes.

In *Arizona* v. *California*, the theory was not stressed by the U.S. attorneys who favored a theory of federally reserved rights, with rights flowing from the Federal Government to the tribes. Use of this theory has strengthened the claim of the States that the tribes are limited in the manner in which they can use their water.

Generally we feel that the United States has breached its trust responsibilities to the tribes with respect to protection of tribal water rights. In our case, the United States failed to aggressively assert claims and legal theories. In other cases, the United States has had a clear conflict of interest in water litigation which has precluded forceful representation of tribal claims.

The history of water rights litigation on the Colorado River Indian Reservation is not over yet. The tribes are currently involved in litigation with the Metropolitan Water District of California over the boundaries of the reservation. This litigation will impact our rights to water as these rights are inextricably tied to the concept of reservation boundaries. It appears that we will be facing challenges for quite some time from those who wish to take our water.

While the Colorado River Indian Tribes have chosen a course of litigation in order to secure our water rights, we strongly feel that each tribal government must independently pursue fulfillment of its water rights and claims through whatever strategy or tactics they feel best suited to their situation. We have gained certain benefits through judicial action, though the course of that action has not always been smooth. All tribes should be free to settle or litigate their claims free from outside pressure to choose either course.

I would also like to add that in 1865, setting aside these reservations which was our territory, and aboriginal grants of the Mohave people, since that time we have worked— this has been over 117 years, the first in 1867—moneys were appropriated for our irrigation system—117 years and we are still at it trying to do the things that we need to do for our tribes' existence, survival, and in doing that, we have produced food and fiber not only for our reservation but for the United States and our country here, so $50 to $60 million is going off our reservation. We get very little of that, but knowing that we are still developing as a developing nation, we feel that by supporting the tribe itself, we can support those and the rest of the country, not in fulfillment, but to help in food and fiber elsewhere.

In conclusion, the Colorado River Tribes would like to state that we oppose any generalized Federal legislation on Indian water rights. We see no benefit that we can gain from such legislation, but we can foresee many ways that such legislation could detract from the rights we have fought long and hard to win.

We have fought for 30, 40 years as far as our water rights is concerned on our reservation, and we still see people trying to steal our water through other means when the legal is on our side.

Thank you for the opportunity to give you this testimony today.

Mr. Muys. Thank you. Let's move up to the third panelist.

Ms. Jenkins.

STATEMENT OF MINERVA JENKINS, CHAIRPERSON, FORT MOJAVE INDIAN TRIBE

Ms. Jenkins. Thank you. Mr. Chairman, my name is Minerva Jenkins. I am president of the Fort Mojave Tribe. I would like to thank you for the opportunity to testify before the Subcommittee Workshop on Reserved Water Rights. I come here today to present the views of the Fort Mojave Tribe on the topic of use and management of reserved water rights.

Our tribe is in a unique position to speak on this topic. We are one of the five tribes on the Colorado River whose rights have been quantified in this case, in this case of *Arizona* v. *California*. That case was the first case to quantify tribal water rights, but before I address this particular issue, let me briefly provide you with some information about the Fort Mojave Tribe.

The Fort Mojave Indian Reservation is located on the Colorado River within the State of Arizona, California, and Nevada. The river actually runs in the middle of the reservation. The reservation extends from the military Fort Mojave near Bullhead City, AZ, to 8 miles south of Needles, CA, near where the wildlife refuge is located.

Historically the tribe's original homeland covers a vast area. However, in the 1890's the tribe was forced to sell a 38,000-acre reservation. This reservation is governed by a seven-member tribal council.

Economically the tribe can raise virtually all of its income from leasing land for farm development. The quality of the tribe's farming is quite good. The primary crops are cotton, alfalfa, wheat, milo, and specialty crops. As I stated earlier, the Fort Mojave Tribe was one of the five tribes whose right in the *Arizona* v. *California* suit—*Arizona* v. *California* was the first case which established the quantified tribe water right. Thus, our tribe was one of the first tribes to have its rights quantified. Our case was experimental for the Government in this respect.

Our experience with the litigation was far less than satisfactory. In the original case which began in 1952 we were represented in court solely by the U.S. Government. In 1964, the Supreme Court awarded the Fort Mohave Tribe water to irrigate approximately 19,000 acres. In 1977, the four other Colorado River tribes challenged this allocation. We argued that the Government had failed to claim water rights for all irrigable lands within the reservation. Later the tribes were joined by the United States who admitted that they had not made a claim to all such lands.

In the trial before the special magistrate in 1980 through 1981, it was proven that the Fort Mojave Tribe was entitled to water rights for an additional 6,000 irrigable acres. This was land that the Government had purchased at fair value in the 1963 proceeding. The State parties opposing the tribe even agreed that the tribe was entitled to substantial additional irrigable lands based upon the Government's failure. On March 30th, 1982, the Supreme Court decided that the tribes' challenge—decided the tribes' challenge. The court refused to allow any additional rights. It did not question the facts or merits of the claims, but refused to grant any additional rights in order to protect the interests of non-Indian users, so-called interests in finality.

The dissenting opinion of three judges called the decision a manifest injustice to the tribes. Needless to say, the Supreme Court decision was a devastating setback to the tribe. The loss of a legitimate claim to 6,000 irrigable acres is a real and measurable economic loss to the tribe and means that the tribe will have to limit its economic development in the future.

Before the 1964 decree there was virtually no agricultural development on the reservation, but not long after the tribe began utilizing this valuable resource to develop the prime farmland. In 1965 the tribe began entering into large-scale lease agreements for farming projects. Over the last 9 years, nearly 16,000 acres of tribal land has been placed into production. Of that 16,000 acres, approximately 12,500 acres were leased to private companies and approximately 2,500 acres was developed by the tribe itself. Since that time, the tribal irrigation project has been constructed with BIA funding that will enable the tribe to place another 2,400 acres into cultivation.

The problem, of course, is that our tribe lost the water rights to irrigate all of these lands. The Tribe proved its entitlement to these rights, but because of the Government's neglect, we must leave with less than all the full rights. Having been involved in the *Arizona* v. *California* litigation, the Fort Mojave Tribe is in a unique position to offer its comments on the topic of this panel which is use and management of the resource. Naturally this perspective is a product of our experience in *Arizona* v. *California* and our loss of our rights.

The first such perspective is that in a case such as ours, Congress must intervene to see that the tribe receives its full reserved water right. In this case, no party, not even the State parties, seriously questioned the tribe's entitlement to an additional 6,000 acres. In such cases, Congress must intervene to provide full relief to the affected tribe.

Second, if nothing else, the Government should learn from *Arizona* v. *California* that it must work closely with the tribes in preparing water claims. *Arizona* v. *California* shows that the Government is nonassertive when left to its own devices. This is surely the key lesson from the case. When the Government goes it alone and tribal experts and tribal attorneys were not involved as in *Arizona* v. *California,* it is likely that tribal rights will be lost.

In our case, the Fort Mojave Tribe lost water to irrigate 6,000 acres.

The solution must come from the Government in terms of funding the tribes to enable them to hire their own experts in hydrology, engineering and economics to monitor the Government's efforts. This money must also include money for our tribal attorneys to monitor the legal theories behind the claims.

The likelihood of a repeat of the first *Arizona* v. *California* case is greater than some might imagine. Under the present administrative funding for technical studies to prove water claim is very scarce and there are, as I understand it, over 50 water adjudications throughout the country. It is likely that some of these tribal claims will not be fully developed and asserted if the necessary studies are not funded. In such cases, the tribes will not be receiving their water rights that they are entitled to, and history might repeat itself. I am sure this is something that the Government does not want to happen again. The cost to all parties, including the Government, is much too high.

Finally, as one of the very first tribes whose rights were quantified, we are in a good position to speak to the issue of whether tribes should quantify their rights. Our experience was not good in that the Government failed in its duty to claim all valid rights. We lost at least 6,000 irrigable acres. Nevertheless, if a tribe can be sure that the Government will assert all claims by the means just mentioned, our experience shows that quantification is desirable.

Before the 1964 decree quantified our rights, there was virtually no agricultural development. Since then, over 16,000 acres have been put into production. Certainly it is no coincidence that this development occurred after quantification. Therefore, I believe that it is an advantage in commercial development to have our rights quantified if the full rights can be claimed.

That will conclude my remarks to the subcommittee. Once again, on behalf of the Fort Mojave Tribe, I would like to thank you for the opportunity to appear before this subcommittee workshop.

[The prepared statement of Ms. Jenkins follows:]

WRITTEN TESTIMONY OF MINERVA JENKINS

HOUSE SUB-COMMITTEE
ENERGY AND NATURAL RESOURCES

UNITED STATES CONGRESS

JUNE 19, 1984

The following written statement is submitted by Minerva Jenkins, Chairperson of the Fort Mojave Indian Tribe, to be incorporated in the sub-committee's record for the June 19, 1984 Indian Reserved Water Right Workship.

The Fort Mojave Indians live on a 38,000 acre reservation that straddles the Colorado River. The Reservation lies within the three states of Arizona, California and Nevada. These lands were established as an Indian Reservation by Executive Orders of September 18, 1890 and February 2, 1911.

The Fort Mojave Tribe is one of five Indian Tribes whose water rights have been adjudicated and quantified in the monumental Arizona v. California litigation that was initiated in 1952. As seen on the attached map labelled "Exhibit 1" the Fort Mojave Reservation is located to the north of the other tribes, whose rights were quantified in that case, the Chemehuevi, Colorado River, Quechan and Cocopah Tribes. The Reservation is a narrow shaped area that extends from the old military Fort Mojave site near Bullhead City, Arizona to eight miles south of Needles, California. The reservation lies within the Mohave Valley of the Colorado River, and extends to Mohave County, Arizona, San Bernardino County, California, and Clark County, Nevada. The tribal government headquarters are located in Needles. Tribal governmental operations are managed by a tribal chairperson and six tribal council members.

The water rights of the Fort Mojave Tribe were litigated and quantified in the landmark Arizona v. California litigation. The proceeding began in 1952 when the State of Arizona filed a complaint under the original jurisdiction of the U.S. Supreme Court seeking confirmation of its rights and further relief under the Colorado River Compact and the Boulder Canyon Project Act, 43 U.S.C. §617. The United States intervened in that proceeding and claimed reserved watr rights for five Indian Reservations, the Fort Mojave, Colorado River, Fort Yuma (Quechan), Chemehuevi, and Cocopah Reservations.

On June 3, 1963, the Supreme Court ruled that the Fort Mojave Tribe and othr tribes were entitled to allocation of water from the Colorado River based upon the reserved rights doctrine. The Court's March 9, 1964 Decree awarded to the Fort Mojave Tribe a diversion right of 122,648 acre feet of Colorado River water to irrigate 18,974 acres or to use for other related uses. The Tribe's priority date for this right was determined to be September 18, 1890 for lands established by Executive Order of that date and February 2, 1911 for lands set aside by Executive Order of that date.

Thirteen years later, the water rights established in the 1964 Decree were challenged. In 1977, the Fort Mojave, Chemnehuevi and Quechan Tribes requested permission to intervene in the litigation to clam additonal rights. In 1978, the Colorado River and Cocopah Tribes joined in filing motions for leave to intervene. The Tribes sought to intervene on the grounds that the United States could not adequately represented their interest; that the government had failed to claim water rights to all irrigable lands within their reservation and that there were additonal "boundary lands" that had not been included in the orignal government claims.

On December 22, 1978, the United States joined the Tribes' request to seek these additional water rights. The respective motions were granted and a Special Master was appointed to hear evidence on the claims for "omitted" and "boundary" lands.

Extensive hearings were held before the Special Master between September 2, 1980 and April 7, 1981. And on February 22, 1982, the Special Master issued his report. The report sustained, in virtually every respect, the claims asserted by the United States and the Tribes. Based upon the Master's findings, the Fort Mojave Tribe would have received an additional award of 36,280 acre feet to divert from the Colorado River to irrigate an additional 5,616 acres above and beyond the award of the 1964 Decree.

The States of Arizona and California and other adverse parties thereafter filed exceptions to the Special Master's Report. On March 30, 1983, the Supreme Court ruled on those exceptions and, with minor exceptions, found against the Tribes and government and in favor of the State parties. The Court determined that the prior determination of the Tribes' rights in the 1964 decree foreclosed any relitigation of those rights. The court based its decision on a finding that there had been a "full and fair" adversary adjudication in the prior proceedings. Thus the court denied the Fort Mojave's claim and the other Tribes' claims for additional rights. The dissenting opinion of three Justices called the decision a "manifest injustice" to the Tribes.

Recently, on April 16, 1984, the Court issued a Supplemental Decree setting forth the Tribes' current water right entitlements. At present, the decree recognizes the Fort Mojave Tribe's right to divert a total of 129,766 acre feet to irrigate 20,076 irrigable acres. These figures represent an increase of 7,119 acre feet and 1102 irrigable acres from the 1964 Decree due to includsion of lands that had been purchased by the Tribe and lands that had been added to the reservation by accretion since 1964. In all other respects, however, the 1964 Decree award was kept intact.

Having been involved in the Arizona v. California litigation, the Fort Mojave Tribe along with the Colorado River, Quechan, Chemehuevi, and Cocopah Tribes, is in a unique position to offer its comments and perspectives on the issues presented to this Sub-Committee.

Needless to say, the Supreme Court's decision was a major setback and disappointment to the Fort Mojave Tribe, especially so because the government's failure to claim the full measure of a Tribe's rights has resulted in a real and measurable economic loss to the Tribe. The Tribe has been very active in exercising its reserved rights once they have been quantified. Consequently, the loss of additional rights is not a loss of "paper rights" that might never be used, but of real rights that the Tribe would have put to effective use. This point is borne out by the close relationship between quantification in Arizona v. California and Fort Mojave agricultural development. Before the 1964 Decree, which awarded water rights to irrigate ready 19,000 acres, there was virtually no agricultural development on the Reservation. But not long thereafter, the Tribe began to utilize this valuable resource to develop its prime farmland. In 1975, the Tribe began entering into large scale lease agreements for farming projects and over the last nine years nearly 16,000 acres of tribal lands has been placed into production. Of that 16,000 acres, approximately 12,500 acres was leased to private companies and approximately 2,500 acres was developed by the Tribe itself.

Since that time, a tribal irrigation project has been constructed with BIA funding that will enable the Tribe to place another 2,400 acres into clutivation.

Having been involved in the Arizona v. California litigation, the Fort Mojave Tribe is in a unique position to offer its comments on the topic of this panel which is ownership and control of water rights. Naturally, this perspective is a product of our experience in Arizona v. California, and our loss of water rights.

The first such perspective is that in a case such as ours, Congress must intervene to see that the Tribe receives its full reserved water rights. In this case no party, not even the state parties, seriously questioned the Tribe's entitlement to an additional 6000 acres. In such cases, Congress must intervene to provide full relief to the affected Tribe.

Secondly, if nothing else, the Government should learn from Arizona v. California that it must work closely with tribes in preparing water claims. Arizona v. California shows that the Government is non-assertive when left to its own devices. This is surely the key lesson from the case. When the Government goes it alone and tribal experts and tribal attorneys are not involved, as in Arizona v. California, it is likely that tribal rights will be lost. In our case, the Fort Mojave Tribe lost water to irrigate 6,000 acres.

The solution must come from the Government in terms of funding to tribes to enable them to hire their own experts in soils, hydrology, engineering and economics to monitor the Government's efforts. This funding must also include monies for our tribal attorneys to monitor the legal theories behind the claims.

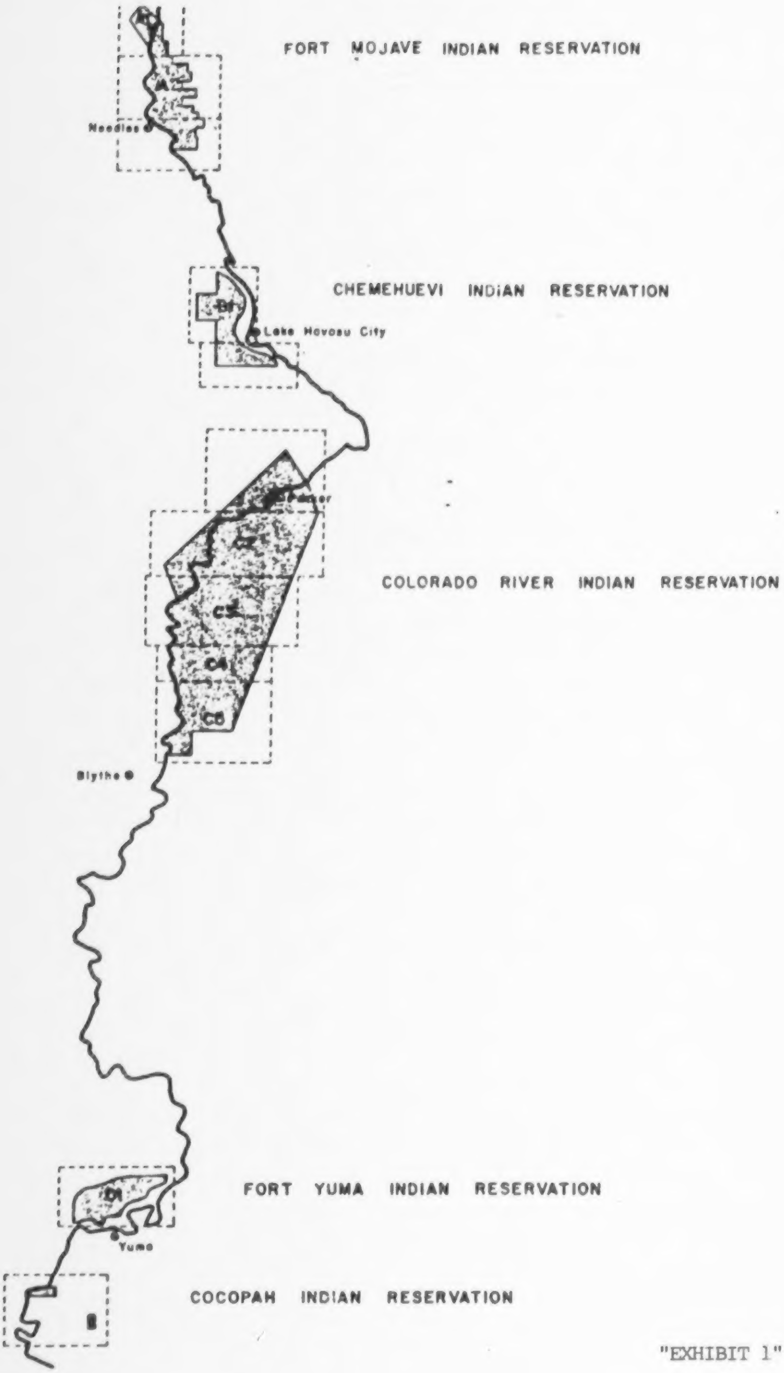
The likelihood of a repeat of the first Arizona v. California case is greater than some might imagine. Under the present administrative funding for technical studies to prove water claim is very scarce and there are, as I understand it, over 50 water adjudications throughout the country. It is likely that some of these tribal claims will not be fully developed and asserted if the necessary studies are not funded. In such cases,the tribes will not receive the water rights they are entitled to and history may repeat itself.

I am sure this is something that the government does not want to happen again. The cost to all parties, including the government is much too high.

Finally, as one of the very first tribes whose rights were quantified, we are in a good position to speak to the issue of whether a Tribe should quantify its rights. Our experience was not good in that the government failed in its duty to claim all valid rights. We lost at least 6,000 irrigable acres. Nevertheless, if a Tribe can be sure that the government will assert all claims by the means just mentioned, our experience shows that quantification is desirable.

Before the 1964 Decree quantified our rights, there was virtually no agricultural development. Since then, over 16,000 acres have been put into production. Certainly it is no coincidence that this development occurred after quantification. Therefore, I believe that it is an advantage in commercial development to have reserved rights quantified, if the full measure of rights can be claimed.

That will conclude my remarks to this sub-committee. Once again, on behalf of the Fort Mojave Tribe I would like to thank you for the opportunity to appear before this sub-committee workshop.


FORT MOJAVE INDIAN RESERVATION
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D1
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COCOPAH INDIAN RESERVATION
E

"EXHIBIT 1"

Mr. Muys. Thank you, Ms. Jenkins. Have either the Colorado River Tribes or the Fort Mojave decided to sue the Government for inadequate representation the first time around? Do you know?

Mr. Drennan. No, not the first time, in looking at it.

Mr. Muys. Mr. Steele, Mr. Steele, do you have a separate statement?

STATEMENT OF JAMES STEELE, VICE CHAIRMAN, CONFEDERATE SALISH AND KOOTENAI OF THE FLATHEAD RESERVATION, ACCOMPANIED BY DANIEL F. DECKER, GENERAL COUNSEL, CONFEDERATE SALISH AND KOOTENAI OF THE FLATHEAD RESERVATION

Mr. Steele. I would like to extend my appreciation to Senator Wallop on behalf of the tribes for the opportunity to come to the discussion today.

I have with me today Daniel Decker, general counsel. Today I wish to express my feelings as an elected leader with the tribes, attempt to relay to you the prevailing attitude of our tribes.

However, I would first like to say that we have not come here today as fully prepared as we would like to be, but it is my understanding that we will have an opportunity at a later date to submit a more clear, concise report on the tribes' efforts on water resource management. I will, however, submit this as an introductory report to indicate our interest in becoming more involved with our other tribes throughout the United States in taking a united stand toward resolving what has become a major concern for all of us people.

As a short historical note, the tribes are located on the Flathead Reservation in northwest Montana; 1.24 million acres of land are located within its exterior boundary, of which the tribes own approximately 573,000 acres of that, and individual Indians own approximately 47,000 acres.

Our reservation land base is quite checkerboard, meaning tribal and free status lands border one another which causes sometimes severe jurisdictional problems in all areas. The greater portion of the agricultural land was in the hands of the Indians primarily due to the Allotment Act in which our past leaders refused to participate, but when ignored by the Federal Government, went ahead and implemented said action because of the not so old adage the Federal Government knew what was best for us.

Right on the heels of this came the Homestead Act which opened our reservation up. Since the primary occupation of these settlers was farming and ranching, the Federal Government determined that an adequate irrigation system was needed and that the development of the same prior to the full-scale input of the settlers when official surveys of the irrigation projects began. Needless to say here, we are today attempting to deal with the many problems that resulted from these efforts on behalf of the whites by the Government.

To date our water resources have been managed by the Bureau of Indian Affairs which has been inadequate to say the least, with a slight tinge of incompetence. Although we could go on and on about the Bureau of Indian Affairs, I do not feel we are here for that. Our stand on the national front today is that we do not support a national overall policy regarding the Indian water rights issue, the reasons being diversity of cultural, geographical impact, historical problems of each of the tribal governments, to name a few.

We do support this to be a part of a continuing battle for comprehensive Federal resource management on the national level.

We also support efforts on the national level, and that the moratorium placed on Indian water codes be lifted. We all know of our ability to commence effective management of water resources demands and we need to have this hobble placed on our sovereignty removed and removed now.

Thank you. That's it.

Mr. MUYS. Thank you, Mr. Steele. Now we will hear from your lawyer, Mr. Decker.

Mr. DECKER. Thank you, Mr. Chairman. Because much of my statement is similar to the statements made by other panel members, I will try to edit some of my remarks.

STATEMENT OF DANIEL F. DECKER, GENERAL COUNSEL, CONFEDERATE SALISH AND KOOTENAI OF THE FLATHEAD RESERVATION

Mr. DECKER. Members of the panel, people in attendance, it must be remembered that the three tribes have reserved to them the land base and the necessary water to provide for future generations.

As a child I went through the statement to me by my elders that without the land base, the Government would never have acted as if there were any Indians in existence. Now some of the tribal elders say without the natural resources and without the water, the Government would once again act as if there were no Indians.

In order to distinguish the Indians' title to the land, the U.S. Government had to enter into treaties and agreements with the tribes. In order to gain ownership and title for Indian lands, now the States and the Federal Government are trying through negotiations and other efforts to gain control from the new tribal water resources. It would seem that history is repeating itself. The past tells us that the non-Indian interests, when they needed more land, it was an Indian problem. Now it is an Indian problem because non-Indians are desiring more water and tribes possess a quantity of water that non-Indians perceive to be available.

It is important that, you have to remember that the Winters rights were there for the tribes, and that Winters rights may include reservation of water for other than agricultural purposes, and non-Indian interests have tried restricting new tribal water rights to domestic stock water and general agricultural purposes, and no cases have approved such a limited restriction. Early cases implied that they were reserved water rights for any primary reservation purpose for which water was needed.

It has been held that tribes may have reserved water rights for fisheries. Further, the U.S. Ninth Circuit Court this spring held that the Indians were entitled as a tribe to reserved water rights with priorities for as much water on the reservation land as they need to protect their hunting and fishing rights. I believe that it is important that we all listen carefully to what the other is saying and try to understand the position that each of us must take, and it reminds me of a story that comes from the tribe.

It is a horse trading story, and some tribal members have heard the story. It is a story about a horse that looks good.

An elder on a reservation had a horse, and it was a fine looking animal, and he would dance around, and one day a non-Indian was passing through the reservation and he saw the horse and he said my, that's a beautiful animal, so he went and he took a look at the horse and was watching it.

About that time an elder came out of the household and he walked over to the old man and said I would like to buy your horse, and the old man said no. He said but I would like to buy it, and the man said no, he is not for sale. The old man left, but he was intrigued by the beautiful animal so he returned, and he said sir, I would like to buy your horse, and the old man said he looks good, but he don't look so good, and the man said I don't understand. The old man said well, he looks good but he don't look so good and he is not for sale, and the man left.

He came back again the next day and said, sir, I really think that's a fine animal out there and I must have him, and the old man said well, he looks good, sir, but he don't look so good, and the man became real insistent, so the old man sold him and as he was leaving the old man said, remember, he looks good but he don't look so good.

A week later the man returned and said sir, you should have told me the horse was blind. The old man said well, I told you that he looks good but he don't look so good. And I think the story emphasizes that although we may understand the common language, the perspective from which it commences is very important, and the cultural differences have been stressed before, but we must remember that water culturally has great significance to tribes because of religious reasons and because of the perspective from which we come.

The tribes desire to exercise their sovereign powers of self-government. The tribes desire to manage their own resources to the benefit of tribal membership for future generations and for all reservation residents. The Confederated Tribes believe they have shown the ability to manager their resources effectively and efficiently. Many tribes have made great strides in resource management and are continually developing their expertise to improve upon that which they may have already made.

It is within this area that the tribes have been restricted from exercising sound, effective water management policy because the Bureau of Indian Affairs placed a moratorium on approval of tribal water codes. In order to properly manage, protect and make sure that water resources are there for future generations on the reservation, we need to have the ability to develop comprehensive water codes. It seems that if the Bureau of Indian Affairs were concerned with its trustee role, the Bureau would lift the moratorium, and in addition the Bureau would be providing additional funding for the tribes to do water inventories and assessments on the development of water codes for future tribes.

Councilman Steele has mentioned on our reservation the Bureau of Indian Affairs irrigation. It is the Bureau that has managed tribal water resources solely to the benefit of the Bureau of Indian Affairs in controlled irrigation projects. This project benefits largely non-Indians residing on the reservation because of the Homesteading Act. This project has been plagued by mismanagement, both fiscally and physically. At the current time it is estimated, depending upon the consultant's reliability, that anywhere from 60 to 70 percent of the water entering the irrigation project is lost by a poorly maintained storage facility and canal irrigation distribution ditches. This loss is the loss of a tribal resource, and the tribes are very concerned with that, and it is the tribes that are going to be penalized for the loss of this resource for the benefit of non-Indians, and it must be remembered that it is the tribes who with restricted and then limited resource because of this project must meet the current and future needs of the tribe

While we sit and wonder, talking about the development of water codes, what about the jurisdiction of the tribes, the reservation lands and resources that may encompass both Indians and non-Indians? An often cited authority for tribal power to regulate on the reservation is *Montana* v. *The United States* case of 1981 which states a tribe may regulate through taxation or other means the activities of nonmembers who enter relationships with the tribe or its members—contracts, leases or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on a free land within the reservation when that conduct threatens or has some direct effect on the political integrity or the economic security or the health and welfare of the tribe.

Further, our tribes in the Confederated States, including the tribes of the Flathead Reservation, have relied on other decisions for holding that confederated tribes have the authority to regulate the building of docks and wharfs likewise on Flathead Reservation.

More specifically, on water regulation, the *Tribes* v. *Walton*, 1981, has indicated that tribes may well have the jurisdiction necessary to regulate all water rising on the reservation land. The States seem to feel that it is necessary that they regulate all water within a given State, but there is no reason why the tribes cannot develop their own water for their own management system. That may be consistent with what the State laws are. There is no reason why the tribe cannot manage their own resources.

It seems at times that the question usually comes down to the question of whether or not the Indians can effectively manage which reminds me of another story. It is a true story.

Two years ago we had the State fish and game department coming in on a management issue—big game, and one officer became very concerned. He said well, I just don't understand that you people think you can manage big game because the big game knows no boundary. Big game is all over, and he kept insisting that the tribes cannot have the expertise, and one councilman explained that we had wildlife biologists, that we had fish biologists, that we had fish and wildlife officers, that we had effective codes in place, and some of our game populations were on the increase.

He was still real insistent. Finally another tribal councilman said, well he says, I hate to turn the management of my wildlife over to you he said because my grandfather turned the buffalo over to you and look what happened.

The tribes are concerned with many things, but one of their basic concerns are because of our cultural diversity because you have our geographical diversity, because of the different economic needs that each tribe gained or had, that no policy be looked at as the quick fix approach to the Indian water problem, and then it reminds me of a final story in closing that I was once told about.

It is about a young man who is walking down the creek and he became hungry and he looked at the creek and he could see berries in the stream, and he dug through the berries and couldn't get them and he couldn't reach far enough down in the water to grab the berries, so he thought about it for a long time and he thought well, the quick answer to this is just a dive in the water. Well, the young man dove into the creek and he hit his head, and when he was looking up from his back out of the water, he saw the berries hanging in a tree over the top of the stream, and what he had actually seen was the reflection, but what I am trying to say is don't go for what may be perceived as the quick, easy answer to a water problem that we all face—States, tribes, Federal Government face—because that may not be the approach.

Thank you.

[The prepared statements of Mr. Decker follow:]

June 22, 1984

USE AND MANAGEMENT OF THE RESOURCE
Panel of the
WORKSHOP ON INDIAN RESERVED WATER RIGHTS
for
THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
SUBCOMMITTEE ON PUBLIC LANDS AND RESERVED WATER

By
Daniel F. Decker
Confederated Salish and Kootenai Tribes
Flathead Reservation, Montana

This statement will deal with use and management of water resources in a general sense due to time limitations. To understand Indian Reserved Water Rights or "Winters Rights," requires a general understanding of tribal and Federal Reserved Water Rights.

It is legally implied that at the establishment of an Indian Reservation (as in other federal reservations), there was reserved, along with the land, sufficient water to fulfill the purposes of the reservation. Winters v. United States, 207 U.S. 564 (1908). Thus, Indian water rights have a priority date of the date of the creation of the reservation or, in some cases, from "time immemorial."

Tribes believe that "Winters Rights" are open ended and change and increase as the needs of the tribal reservation change and increase. This is only logical in order to fulfill the purpose of a permanent tribal homeland and the future needs of the tribes.

Further, Winters Rights may include a reservation of water for other than agricultural purposes. Non-Indian interests in the past have tried to restrict tribal water rights to domestic stock watering and general agricultural purposes. To date no cases have approved such a restriction and the early cases implied that the reserved water right was for any primary reservation purpose for which water was needed.

Also, It has been held that tribes have reserved water rights for the maintenance of tribal fisheries. Colville Confederated Tribes v. Walton, 647 F.2d 42 (1981), U.S. v. Anderson, #3643, E.D. Wash. July 23, 1979. Further, United

States v. Adair, 723 F.2d, 1394 (1983), held that the Klamath Indians, though terminated as a Tribe, held Winters Rights with a priority date of time immemorial "to as much water on the reservation lands as they need to protect their hunting and fishing rights."

These cases reinforce the position that Treaty tribes have reserved to themselves a landbase and the necessary water to provide future generations with a permanent tribal homeland.

As a child I once heard the statement that without the landbase the government would have acted as if there were no Indians. Now some say that without the water and natural resources the government would act as if there were no Indians. In order to extinguish the Indians' aboriginal title to the land the United States government entered into treaties and agreements with Tribes in order to gain ownership to Indian lands. Now, the States and the Federal government are trying through negotiations to gain control of tribal water resources.

It would seem that history is repeating itself; the past tells us that when non-Indian interests needed more land there was an "Indian problem." Now, once again there exists an "Indian problem" because non-Indian interests desire more water and Tribes possess a quantity of water that to non-Indians, appears to be available.

I believe that it is important that we all listen carefully to what the other is saying and try to understand the positions that each of us must take.

The Confederated Salish and Kootenai Tribes, like other Tribes, desire to exercise their sovereign powers of self-government. They desire to manage their resources to the benefit of the Tribal membership, future generations, and for all Reservation residents.

The Confederated Tribes believe that they have shown the ability to manage their resources effectively and efficiently. Many tribes have made great strides in natural resource management and are continually developing their expertise to improve upon that which they may have already in place. It is within this area that tribes have been restricted from exercising sound effective water management policies, because the Bureau of Indian Affairs has placed a moratorium on approvals of tribal water codes.

In order to properly manage and protect the water resources of the reservation, the Tribes need to have the ability to develop comprehensive water codes. It seems that if the BIA were really concerned with its trustee role, the Bureau would lift its moratorium. In addition, the federal government would be providing additional funding to tribes to do water inventories and assessments of future tribal needs.

On the Flathead Reservation it is the Bureau of Indian Affairs that has managed the Tribal water resources solely to benefit of a BIA controlled irrigation project, the Flathead Irrigation Project, which largely benefits non-Indians residing on the Flathead Reservation. This project has been plagued by mismanagement, both physically and fiscally - At current times it is estimated that anywhere from 60 to 70% of the water entering the project is lost by poorly maintained storage facilities, canals, and irrigation distribution ditches. This loss is a loss of a Tribal resource, and it is the Tribes that are expected to meet current and future needs while this waste still occurs.

What about the jurisdiction of the tribes to regulate water on the reservation lands which may encompass both Indians and non-Indians. An often-cited authority for tribal power to regulate on-reservation activity is Montana v. United States, 450 U.S. 544 (1981), which states at pages 565-566:

> "A tribe may regulate through taxation, licensing, or other means, the activities on nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements... A tribe may also

> retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

See, also,

Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation v. Namen, 655 F.2d 951 (9th Cir. 1982), cert. denied, 103 S. Ct. 314 (1982), relied on Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), and Montana v. United States, supra, for holding that the tribes have authority to regulate the building of docks and wharfs on the Flathead Lakeshore.

More specifically on water regulation, the Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), cert. denied, 102 S. Ct. 657 (1981), has indicated that tribes may have the jurisdiction necessary to regulate all waters arising on and ending on reservations.

The states seem to feel that it is necessary that they regulate all the water within the given state, but there is no reason why tribes and states couldn't develop a consistent policy approach to water regulation, as both tribes and states are concerned with proper use of a finite resource. And, the Confederated Salish and Kootenai Tribes, as the owners of the water resources on the Flathead Reservation, wish to regulate the use of their resource to the benefit of future generations needing the reservation for their tribal homeland.

Supplemental Statement
Workshop on Indian Reserved Water Rights
For
The Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands and Reserved Water
By
Confederated Salish and Kootenai Tribes
Flathead Reservation, Montana

The "Winters" doctrine, also known as the "implied reservation of water" doctrine, has been consistently reaffirmed by the United States Supreme Court. The Winters doctrine applies to Indian reservations whether created by treaty, agreement, executive order, congressional act, or secretarial order. Winters rights should attach to all water sources affecting the reservation land base - groundwater, streams, lakes, and springs, which arise on, border, traverse, underlie, or are encompassed within the reservation boundaries. This listing of water sources makes no distinction between surface and groundwater; and because of their relationship, there would seem to be no logical distinction between surface and groundwater to the extent that either is needed to satisfy the purposes of the reservation. This principle of the close interrelationship between ground and surface water sources was advanced by the National Water Commission in 1973.

When an Indian reservation was established it reserved a sufficient quantity of water to fulfill the purpose for which the reservation was created. All Indian reservations have a central purpose of serving as a permanent homeland for the tribal group who resides there. Since there are many tribes, and each of the tribes have a unique history and cultural existence which was keenly adapted to the geographic area in which they lived, water entitlements and demands may vary from reservation to reservation. Therefore, a reservation may be entitled to water for anything from agricultural to fisheries purposes.

Basically an Indian Tribe should be able to use all the water it needs by utilizing its Winters rights to fulfill the purpose of a permanent tribal homeland. A tribe in most cases will possess senior rights, under the doctrine of prior appropriation, and is entitled to use its full share of water without sharing water with junior appropriators. It is with this in mind that courts, when determining water rights for Indian reservations, are not to engage in the balancing of interests between Indian and non-Indian water users.

The Winters doctrine to be meaningful must allow the Indian water users the flexibility to accommodate for the changing times. If Indian reservations are to serve as a permanent homeland, Indian tribes must be allowed to change their water uses according to their abilities to meet the needs of the Indian people within the limits of their economy and technology. In Colville Confederated Tribes v. Walton, 647 F.2d 42, 49 (9th Cir. 1981), cert. denied, 102 S.Ct. 657 (1981) the Court states:

"permitting Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation - providing a homeland for the survival and growth of the Indians and their way of life."

The United States government has a trust responsibility to protect Indian property interests. The treaties that the tribes entered into imposed an obligation on the federal government to preserve the tribal homelands in exchange for aboriginal title to Indian lands. Essentially the United States as trustee for Indian tribes must preserve the title to rights to the use of water which Indians had reserved for themselves.

The United States as trustee has historically been charged with the responsibility of administering trust property for the benefit of tribes. The United States for political reasons has failed to fulfill its role as trustee in securing, protecting, and developing water sources and supplies for Indian tribes. As the National Water Commission stated in its 1973 report to Congress:

> During most of this 50-year period [following the decision in Winters v. United States, 207 U.S. 564 (1908)], the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the Winters doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior - the very office entrusted with protection of all Indian rights - many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations, sometimes above and more often

> below the Reservations. With few exceptions the projects are planned and built by the federal government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects . . . In the history of the United State government's treatment of Indian tribes its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.

The United States Government as trustee over Indian lands and water has delegated responsibility for administration of Indian resources to the Bureau of Indian Affairs of the Department of Interior. The Department of Interior has responsibility for administering federal lands to the benefit of the general public. The Department of Interior agencies in fulfilling their primary duties create inter-agency conflict of interest within the Department. It is our belief that the conflict has diminished the effectiveness of the Secretary of Interior in carrying out his fiduciary obligations or in advocating the development and use of Indian water resources, or in protecting Indian interests.

Indian tribes in developing their water supplies, lack the capital investment that is needed to gain the economic benefits that water could provide. The bare legal right to water does not bring with it the means to fully utilize it. Congress must begin to investigate the needs of the tribes, and make a commitment to fund water projects which will make more water available to Indian and non-Indian water users alike. At the same time, Congress should and must give Indian tribes at least the same priorities as are given non-Indian water projects.

The federal government, in assisting tribes to reach their goals for the future of their people, must be willing to listen to what the Tribes have to say, and accept the reality that national policy legislation in regard to Indian rights is not practical. That because of the diversity of tribes, their culture, geography, history, economics, and needs the development of national policy on Indian water rights without consideration for this diversity is doomed for failure, just as history has shown regarding this approach to "Indian problems" in the past.

Tribes want assistance, not directives. Tribes as sovereign bodies need to have their trustee back them, not fight them. Such as with the necessary water codes for proper management of reservation waters, the Bureau of Indian Affairs should lift their moratorim on tribal water codes, rather than tying the Tribes' hands, and stopping effective tribal management of water.

In summary, the Confederated Salish and Kootenai Tribes are not supportive of a single policy approach by the federal government to Indian water rights because of tribal diversity. That the federal government needs to be more protective of Indian property interest, and an advocate for sound development of our water resources. That in the development of our water resources as our trustee the federal government needs to assist by adequately funding Tribal programs and providing financial assistance in project developments. Finally, that Tribal governments have the capabilities to manage their water resources effectively and to the benefit of all reservation residents.

Mr. MUYS. Thank you, Mr. Decker. I appreciate your injecting some levity in these very serious deliberations. These are serious problems we are dealing with, but I have found over the years that it helps everyone to know each other a little better and get down to a more human level if we don't all take our positions quite so seriously and don't try to paint a black hat on our adversary.

I was reminded by one of your three stories about one Congressman Udall told himself about how he was campaigning in Arizona. One time he was up in some of the Indian reservations and they were talking about water rights and other problems. He said he was going back to Congress and he was going to take care of all the tribe's problems and all the audience jumped up and yelled, "Umpa." He made a few more promises and the audience got up again and shouted, "Umpa! Umpa!"

Mo said he was really feeling pretty good about his presentation, so he was walking the tribal chairman back to the car and he said well, Mr. Chairman, I think that was a pretty good reception I got down there, and as they were walking by the stable the chairman said, "Yes, it was. Don't step in any of that umpa!" So we have to take some of this rather lightly.

Now we will hear from the man who has probably done more water rights litigation, either suing or being sued, than anyone I know—the State Engineer of New Mexico, Steve Reynolds.

STATEMENT OF STEVE REYNOLDS, NEW MEXICO STATE ENGINEER

Mr. REYNOLDS. I am reminded that Congressman Mo Udall in a hearing in Yuma last September introduced me as a contemporary of Millard Fillmore. As far as he knew, I was the only State engineer Mexico ever had. I modestly remembered to tell him later it was Stephen Watts Kearney that enunciated the law for the Mexico Territory in 1846, not Stephen E. Reynolds.

Water use and management in the West in largely founded on the Doctrine of Prior Appropriation. Under that doctrine, no one has the right to use the public waters simply because it flows by or through or under his land. In times of shortage, the first right initiated must be served. Were it not for that principle, development of any kind would be discouraged if a latecomer solely by the virtue of his ownership in the land could take the water supply upon which earlier investments were based. Economic enterprise other than grazing in an arid State like New Mexico is virtually prohibited.

In recent years the appropriation doctrine States have recognized the need for coordinated management of the surface and ground waters when there is a significant relationship between the stream flow, particularly with regard to compacts of streams. There is still some exceptions in the West.

The Winters doctrine has diluted the appropriation doctrine in Western States and created a sort of hybrid doctrine. It is going to make water use as unmanageable as a mule until water rights are quantified by one or more of the mechanisms available—negotiation, litigation, or an act of Congress. Thus far, we can't be sanguine about one or any combination of these, and we have tried a bit of each of them. Most of the major interstate streams in the West have been apportioned among the States by compact, Supreme Court decree, or an Act of Congress. Most of these apportionments were made by compact.

While those compacts generally recognize that there are Indian water rights, they necessarily cite many quantifications of those rights because of the uncertainty about the nature, extent and priority of Indian rights arising out of Federal law.

The quantification of Indian water rights is essential to the wise management and use of the resource. It surely is important to the Indians as it is to the non-Indians. Quantification becomes critical as water use approaches the limited supply in an arid State. Negotiation is officially the most attractive of the options for quantification of Indian water rights, but negotiation implies give and take. Money or water would seem to be the sine qua non for negotiating the quantification of water rights. New Mexico, like some of the other Western States, has none of either. The uncertainty potential for profound consequences in the general welfare and development of the Western States implicit in the Indian water rights litigation arises out of Federal law. Congress can reasonably perceive a Federal responsibility. Congress could establish a water rights adjudication fund under the control of the Secretary of the Interior to be used by Federal or State entities in preparing nonpartisan evidence for water rights and adjudication suites in both the State and Federal court, and pay reasonable Indian or private, non-Indian litigation costs against the adjudication fund.

Congress already has taken an important step in that direction by appropriating $450,000 through legislation initiated by Senator Domenici to pay litigation costs of non-Indian defendants in the adjudication suit in New Mexico that involves four Indian Puebelos. Congress might also find it appropriate and necessary to contribute funds to implement settlements in water short negotiations.

One small step in that direction is represented by the the Ankoche and Popoco settlement. It seems to me, Mr. Moderator, there is far too much to expect this workshop to solve the problem, but a statement of any problem is necessary to its solution, and we might contribute something to that statement today.

Thank you.

[The prepared statement of Mr. Reynolds follows:]

STATEMENT
for the
USE AND MANAGEMENT OF THE RESOURCE
panel of the
WORKSHOP ON INDIAN RESERVED WATER RIGHTS
Prepared at the Invitation of
Senator Malcom Wallop, Chairman
Subcommittee on Public Lands and
Reserved Water of the Senate Committee
on Energy and Natural Resources
by
S. E. Reynolds
New Mexico State Engineer
June 19, 1984

Admitting that I cannot be objective, I submit that some scholars have said that the New Mexico water law is the best in the west. I can assert with confidence that our water law is in most respects not atypical of that of the rest of the western states. For that reason, an outline of the New Mexico water law and management may help to put in perspective the foundation for the use and management of the water resources of the western states.

The use of water in New Mexico is extensively and intricately governed by law. The water law of the New Mexico Territory was initiated by General Stephen Watts Kearny in 1846. The Kearny Code provided that the laws theretofore enforced concerning water courses would continue in force, except that such regulation as was required was transferred from the officials of the villages to those of the counties.

In 1891 the Legislature required the filing of a notice of the construction of water control works within ninety days of the initiation of such construction and provided that no priority could attach to water rights for such works until the notice had been filed.

In 1898, our Territorial Supreme Court said the doctrine of prior appropriation is and always has been the settled law of this territory by legislation, custom and judicial decision. (U. S. v. Dam & Irr. Co., 9 N.M. January 1898). It said further, in effect, that the public interest required that that be the settled law of the territory.

Under the appropriation doctrine, no one has the right to use the public water simply because it flows by, or through or under his land. In times of shortage, the right first initiated must be first served.

Most modern students agree that the doctrine of prior appropriation is a practical system for the management of water in an arid land. Development of any kind would be discouraged if the latecomer, solely by virtue of his ownership of land, could take the water supply upon which earlier investments are based; economic enterprise other than grazing in an arid state such as New Mexico would have been virtually prohibited.

The appropriation doctrine is clearly enunciated in Article XVI of the New Mexico Constitution: The unappropriated water of every natural stream, perennial or torrential, belongs to the public and is subject to appropriation in accordance with the laws of the State. Beneficial use shall be the basis, the measure and the limit of the right to the use of water. And priority in time of appropriation shall give the better right.

The appropriation doctrine is the antithesis of the "riparian doctrine," sometimes referred to as the "common law," under which the owner of the stream bank is entitled to the continued flow of the stream as against persons upstream who might undertake to divert the flow of the stream for some purpose. Our Supreme Court has found that three elements, effected in accordance with law, are essential to a water right in New Mexico; a man-made diversion, the intent to apply the water to a beneficial use and diligence in carrying out that intention. Simply stated, our Constitution has been interpreted to mean that all of the waters of our streams and underground sources are subject to appropriation; and there can be no appropriation for a beneficial use without a man-made diversion. There can be no "instream right" under our state law. (Harkey v. Smith, 31 N.M. 521 (1926) and State ex rel Reynolds v. Miranda, 83 N.M. 443 (1972))

The Office of the Territorial Engineer was created in 1905 and our surface water code was amended and reenacted in substantially its present form in 1907.

The amended surface water code recognized all rights initiated prior to March 19, 1907, the effective date of the Act (72-1-2 NMSA 1978). Under that code no person may initiate the construction of works for the diversion or storage of water or change his point of diversion, or place or purpose of use without a permit from the State Engineer (Sec. 72-5-1 NMSA 1978). When a permit is applied for, the State Engineer must require a notice of the application to be published in a newspaper of general circulation in the stream system once a week for three consecutive weeks (Sec. 72-5-4 NMSA 1978). Any person whose water right might be affected may protest the granting of the permit within ten days after the last publication of the notice. If a protest is filed, there must be a hearing before the State Engineer before the application is acted upon. The hearing is quasi-judicial in nature. Evidence and legal arguments are submitted by the applicant, the protestant and, in some cases, the staff of the office of the State Engineer.

Whether or not the application is protested and a hearing is held, the State Engineer may grant a permit for a new appropriation only upon a finding that there is unappropriated water available for the benefit of the applicant. The State Engineer may approve an application to change the point of diversion or the place or purpose of use of a surface water right only if the exercise of the permit would not be to the detriment of the rights of others having valid and existing rights to the use of the water of the stream system (Sec. 72-5-23 NMSA 1978).

The Engineer's decision is subject to appeal to the district court.

Our groundwater code was enacted in substantially its present form in 1931. (Sec. 72-12-1, et seq NMSA 1978). The provisions of that code closely parallel the surface water code. Perhaps the most important difference is that the State Engineer has no jurisdiction, except to prevent waste, outside what are called declared underground water basins.

Our State Supreme Court held in a 1950 opinion (State ex rel Bliss v. Dority, 55 NM 12) that the provisions of Article XVI of our Constitution are applicable to the ground waters as well as to the surface waters of the State.

When the State Engineer finds that the waters of an underground source have reasonably ascertainable boundaries, and he so proclaims, or "declares," by describing the administrative boundaries of the basin, he asserts jurisdiction over appropriations from the source for beneficial use (Sec. 72-12-12 NMSA 1978). The State Engineer may declare an underground water basin without prior notice and hearing by filing an order with the State Records Center. The order is effective upon filing, but a public hearing on the order must be held within 30 days of the publication of a notice of the order.

Within a declared underground water basin no well may be drilled without a permit and drilling may be done only by a well driller licensed by the State Engineer. Outside the boundaries of the declared basins the ground water belongs to the public and is subject to the doctrine of prior appropriation, but no permit is required to drill a well and appropriate ground water for beneficial use. About 69% of the State's area -- 84,000 square miles -- is now within the boundaries of 31 declared underground water basins.

To give some historical perspective I would point out that in 1955 only about 8%, or 10,000 square miles of the State's area was within declared groundwater basins.

The essential effect of the declaration of an underground water basin is to shift the burden of proof. Within declared basins, the person seeking to make a new appropriation or to change the location of his well or the place or purpose of use of his water right has the burden of showing that the new appropriation or the change will not impair any existing water rights. With respect to groundwater appropriations outside the boundaries of declared basins, the owners of water rights have recourse to the court if they believe that their water rights would be impaired, but they have no recourse before the Engineer. In seeking an injunction or damages, the owner of a prior water right would have the burden of proof.

This effect is very simply stated, but it can be crucial. Geohydrology is often complex, and sometimes nearly inscrutable, so that the burden of proof can be heavy.

Nearly all of the Indian lands within New Mexico are within the boundaries of underground water basins declared by the State Engineer. The State Engineer has asserted jurisdiction over appropriations of groundwater by non-Indians on Indian lands. The Engineer has not asserted jurisdiction over appropriations by Indians on Indian land, primarily because we do not yet know the nature and extent of Indian water rights. Such an assertion without that knowledge would address the wrong question. The completion of water rights adjudication suits already underway in New Mexico will determine the nature and extent of Indian rights. When decrees are entered in those suits, the court will have jurisdiction to administer appropriations in accordance with its decree. The court may or may not delegate its power to administer the decree to the State Engineer, as the court has done in other adjudications. It may never be necessary to answer the question whether the State Engineer under our statutes has jurisdiction over appropriations by Indians on Indian lands.

A very important, but often overlooked, feature of New Mexico's water policy as set by Constitution and statute is that all beneficial uses are on equal footing; the priority, not the nature of the beneficial use, controls. Our statutes provide certain exemptions from administrative procedures for stock and individual domestic use, presumably because the amounts involved are small and administrative convenience can be provided without substantial risk to water right owners who remain protected against abuse or miscarriage of the administrative exceptions by the Constitutional doctrine of prior appropriation. The only other use preference given by our water policy is the power to condemn water rights for public purposes that is granted to municipalities, counties, the State, and, I presume, the federal government.

In our system of government, judicial legislation is frowned on. But an essential function of our courts is to ensure that the statutes are enacted and administered in accordance with the principles enunciated in our Constitution. This function is particularly difficult and essential in the interpretation of laws dealing with technical subjects such as water. The record shows that our Supreme Court has been studiously careful and has exhibited great wisdom in its opinions in water cases. These opinions have had a profound effect on water management in New Mexico; a discussion of three examples follows.

In Templeton v. the Pecos Valley Artesian Conservancy District and the State Engineer (65 N.M. 59), a 1958 Supreme Court decision, the issue was whether a person having a right to divert the surface waters could drill a well to supplement his supply which had been diminished by junior appropriators drilling and operating wells which intercepted the natural discharge of an aquifer to the stream upon which the surface water user depended.

Considerations of equity might seem to make the answer clear, but our statutes and rules and regulations gave ample ground for plausible, technical argument. The effect of the Court's opinion was that the prior appropriator of stream water has the right to follow the stream water to its underground source and the right to drill wells and take the underground water necessary to fill his prior stream right, regardless of detriment to other underground water appropriators whose rights were subsequent in time to the stream rights.

In City of Albuquerque v. the State Engineer (71 N.M. 428), a 1962 decision, the question was whether the State Engineer could impose, as a condition on a permit to appropriate underground water, a requirement that surface water usage under valid water rights be reduced by an amount sufficient to offset the effects of the groundwater appropriation on the fully appropriated stream flows.

The Court held that the Engineer had not only the power but the duty to impose such conditions on new groundwater appropriations as are necessary to protect surface water rights in a situation where there is a significant hydrologic relationship between the groundwater source and the stream. It is interesting that in this decision the Court relied on and made clear its decision in the Templeton case.

In Templeton and Albuquerque the Court made it perfectly clear that the coordinated management of surface and groundwater is not only possible but is essential under New Mexico's Constitution. These decisions put New Mexico a quantum jump ahead of the other states in the management of groundwater appropriations. That the coordinated management of surface and groundwater is essential is now generally conceded and several states have emulated our law in this respect.

In Mathers v. Texaco and the State Engineer (77 N.M. 239), a 1966 decision, the issue was groundwater mining in the Lea County Underground Water Basin. The term "mining" denotes withdrawals in excess of recharge. In that basin the amount of water in storage in the aquifer is very large compared to the annual recharge; and any practical pattern of withdrawals can have little effect on the discharge from the aquifer in New Mexico across the Texas state line. In discussing the facts the Court termed the aquifer "non-rechargeable."

The Court held that in a geohydrologic situation such as that obtaining in Lea County, mining of the groundwater is acceptable under the doctrine of prior appropriation. The Court concluded:

> The administration of a "non-rechargeable basin", if the waters therein are to be applied to beneficial use, requires giving to the stock or supply of water a time dimension, or, to state it otherwise, requires the fixing of a rate of withdrawal which will result in a determination of the economic life of the basin at a selected time.

In effect, the Court held that it was reasonable for the State Engineer to establish an "economic life" for the basin and to distribute the allowed withdrawals over the area of the basin to achieve an areally uniform time of depletion of the water supply and thus establish a time of use for the rights granted at something less than perpetuity.

Had the Court gone the other way the first appropriation in a non-rechargeable basin might be the last and much of our fresh underground water would have been locked in place.

The 1907 statute (Sec. 72-4-13 NMSA 1978) directed the State Engineer to make hydrographic surveys and investigations of each source of water supply in the State, beginning with those most used for irrigation, and obtaining and recording all available data for the adjudication of rights to the water supply of the State. Our estimates indicate that the total irrigation water right acreage within the State is about 1,436,000 acres, including all irrigated pasture and cropland, and fallow and idle acreage. Prior to 1955, about 169,000 acres of that total had been surveyed and adjudicated. Since that time, an additional 21,000 acres have been adjudicated, and an additional 375,000 acres are currently involved in ongoing adjudication suits, including about 99,000 acres in the San Juan and Pecos River Basins that are being readjudicated. When the ongoing adjudication suits have been completed, a total of about 466,000 acres, or about 32% of the total of irrigation water rights will have been adjudicated.

One might conclude that progress on the adjudication of water rights pursuant to the 1907 directive of the Legislature has been slow. The tendency has been to devote available resources to adjudications only as circumstances make necessary. Those circumstances have been such that more than twice as much acreage has been brought to adjudication since 1955 as in the period from 1907 to 1955. Circumstances that make adjudications necessary are court orders directing the Engineer to make hydrographic surveys for the adjudication of a stream system to resolve disputes among water users; projects such as the San Juan-Chama Diversion Project which blends imported water with native waters which have already been fully appropriated; and demands for basin-wide enforcement of priorities as made by the Carlsbad Irrigation District in 1976.

Thirteen water rights adjudication suits involving 375,000 irrigated acres and about 23,000 defendants are pending. Ten of these involve the water rights of 14 of New Mexico's 19 Indian Pueblos and all four of our reservation tribes. My office is spending over $1 million per year for attorneys, witnesses and court costs in the 13 adjudication suits.

The New Mexico Interstate Stream Commission was created by statute in 1935 (Sec. 72-14-1 NMSA 1978). The Commission consists of nine members, eight of whom are unsalaried. Each of these eight is appointed by the governor to represent a different irrigation district or section of the State. By law the State Engineer is the ninth member and the secretary of the Commission. As its secretary, the State Engineer is the executive officer of the Commission. The Interstate Stream Commission has several important functions. Among these are the negotiation and administration of interstate water compacts. In the United States, the use of interstate streams is governed by the doctrine of equitable apportionment. Indulging in a gross oversimplification, this doctrine can be said to provide that the upstream state cannot withhold all of the water of an interstate stream and the downstream states cannot require the delivery of all of the flow of the stream. The waters of interstate streams may be equitably apportioned between states by interstate agreements, or compacts consented to by the Congress, by Supreme Court decree or by an act of Congress.

In equitable apportionment suits between states whose water laws are based on the doctrine of prior appropriation, the Supreme Court has given great weight to the priority of appropriations in the two states, but has departed from a strict application of the doctrine of prior appropriation across state lines when necessary to protect an existing economy based on the beneficial use of water. An example is the Court's decree in Arizona v. California, et al., (1964), which apportioned to New Mexico from the Gila River system the amount of water needed for then existing rights in New Mexico, even though some of those rights were junior to downstream rights in Arizona.

It is generally agreed that interstate compacts are preferable to Supreme Court litigation in the apportionment of the use of interstate streams among states for the reason that those negotiated agreements can give greater flexibility than is usually possible in a court decree. New Mexico is party to eight interstate stream compacts. All of our major streams are subject to one or more such agreements. One of our streams, the La Plata River, is subject to four interstate compacts. These eight compacts, one Supreme Court decree and three federal district court decrees control the beneficial consumptive use that New Mexico and our neighbors are entitled to make from most of our interstate streams.

Of interest in the context of Senator Wallop's charge to this workshop is the language relating to Indian water rights that is characteristic of the interstate water compacts among the western states.

> Nothing in this compact shall be construed as affecting the obligation of the United States of America to Indian Tribes. (Article XII, Colorado River Compact of 1922).
>
> . . .
>
> Nothing in this compact shall be construed as

> affecting the obligation of the United States of America to Mexico under existing treaties, or to the Indian Tribes, or as impairing the rights of the Indian Tribes. (Article XVI, Rio Grande Compact of 1938).
>
> . . .
>
> The consumptive use of water by the United States or any of its agencies, intrumentalities or wards shall be charged as a use by the state in which the use is made; (Article XII, Pecos River Compact of 1948).
>
> . . .
>
> Nothing in this compact shall be construed as:
>
> (a) Affecting the obligations of the United States to the Indian Tribes: (Article XIX(a), Upper Colorado River Basin Compact of 1948).

There is a school of thought holding that such provisions are intended to brush aside or ignore the rights of the Indian Tribes. I find it more realistic to believe that the authors had no rational alternative. They did not know, and could not determine in any practical time frame, the nature, extent and priority date of the Indian water rights in the streams being apportioned. But it was essential to acknowledge the existence of such rights, if for no other reason than that Congressional consent was needed.

The Interstate Stream Commission also has responsibility for the conduct of litigation over interstate waters. The United States Supreme Court has original jurisdiction over disputes between states; that is, the trial starts in the court of last resort. New Mexico has been party to a number of actions in the United States Supreme Court. Arizona v. California was filed in 1952. New Mexico was impleaded in this case because of her interest in the waters of the Lower Basin of the Colorado River system. In its 1964 decree, the Supreme Court, among other things, apportioned the consumptive use of the waters of the Gila River system between the states of New Msxico and Arizona.

Texas and New Mexico v. Colorado was filed in 1966 with Texas and New Mexico alleging that Colorado had failed to make delivery of water in accordance with the Rio Grande Compact. That case is still pending under a continuance stipulated in 1968 which holds prosecution of the suit in abeyance so long as Colorado each year meets her delivery obligations under the compact. Under this stipulation Colorado has reduced her accrued debit from 944,400 acre-feet at the end of 1967 to 628,000 acre feet.

Texas v. New Mexico was filed in 1974 with Texas alleging that New Mexico has failed to make deliveries of water in accordance with the terms of the Pecos River Compact. The case is still being tried and a final decree is probably more than a year away.

Colorado v. New Mexico was filed in 1978 with Colorado seeking an equitable apportionment of the waters of the Vermejo stream system. Uses from that system in New Mexico with priorities earlier than the turn of the century suffer chronic shortages. No appropriation, other than perhaps minor ones for stock watering, have been made in Colorado. The Colorado Fuel and Iron Company proposes to take water from the system for export to the Purgatoire River system in Colorado.

The Special Master, Judge Ewing Kerr, submitted his report to the Supreme Court on December 31, 1981. The report recommended that Colorado be allowed to take the first 4,000 acre-feet from the stream system, which averages about 5,500 acre-feet per year at the state line. The Court remanded the report to the Master for the reason that it deemed his findings inadequate to support his recommended decree.

On June 4 of this year the Supreme Court held that Colorado did not demonstrate by clear and convincing evidence that reasonable conservation measures in New Mexico could compensate for some or all proposed diversions in Colorado and that Colorado did not sustain its burden of showing that any injury to New Mexico would be outweighed by the benefits to Colorado from the proposed diversion and dismissed the case.

The State of New Mexico on July 3, 1978 prevailed in another very important United States Supreme Court decision. United States v. New Mexico arose out of a suit for the adjudication of water rights in the Mimbres River system. Thus, this suit involves the State Engineer on his motion to intervene rather than the Interstate Stream Commission. In this case, the United States claimed that withdrawal of lands from the public domain for the purposes of the national forests reserved for the United States rights to minimum instream flows for esthetic, recreation and fish and wildlife purposes. The Supreme Court found that the purposes of the forest are to secure favorable conditions of water flows, that is, watershed protection, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States. The Supreme Court held, therefore, that the withdrawal of lands for forest purposes did not reserve water from appropriation under state law to maintain instream flows on the forest lands. This decision has the effect of strictly limiting the purposes for which the United States has reserved waters upon the public domain and is, therefore, of great importance in water management throughout the west.

The Interstate Stream Commission also represents New Mexico in working with federal agencies in formulating plans for federal water projects and in seeking Congressional authorization and appropriations for the construction of those projects.

Much of the construction needed to control and develop New Mexico's water resources is already in place or authorized for construction, principally in the form of federal water projects. Since 1955, about $1.4 billion worth of water projects have been completed, are under construction or have been authorized for construction in New Mexico. While New Mexico is well along in development and management of her water resources, and it is unlikely that we will ever need to seek authorizations for major new irrigation projects, we may yet need costly, municipal and industrial water supply projects such as the Gallup-Navajo Indian Project currently under study by the Bureau of Reclamation with construction costs estimated at $300 million. The project would serve the City of Gallup as well as 32 Navajo Indian communities in New Mexico, Utah and Arizona. Water supply for the uses in New Mexico would require about 24,000 acre feet of the State's entitlement to the waters of the San Juan River system under the Colorado River Compact of 1922 and the Upper Colorado River Basin Compact of 1948.

Rain and snow bring about 85 million acre-feet of water per year to the surface in New Mexico. From the 85 million acre-feet we realize about 3 million acre-feet as runoff. We also get about 2 million acre-feet of runoff from Colorado, principally in the Rio Grande and San Juan River systems, but we net little from outside the State. When we have fully put to use what we are entitled to under the compacts and court decrees governing our interstate waters, the outflow from the State will very closely approximate the inflow from other states.

We are also blessed with about 20 billion acre-feet of ground water in storage below New Mexico; that's equal to all the precipitation we can expect in 240 years -- enough to cover the entire state to a depth of about 260 feet. A little less than one-fourth of the 20 billion acre-feet is fresh or slightly saline and most of that which is fresh must be left in place to maintain equilibrium between the aquifer and New Mexico's apportionment of the related interstate streams.

In 1980 we diverted about 4.4 million acre-feet of water. Of that amount about half was from underground sources and half from streams. Of the underground water taken about half was "mined," this is, taken at a rate greater than the rate of recharge. We practice such "mining" principally on the east side and in the southwest corner of the State.

A little more than half of the water diverted was consumed, or depleted, by evaporation or plant transpiration; the balance returned to the underground sources or stream systems and was available for subsequent diversion in New Mexico or downstream states. About 87% of the water diverted for beneficial use was used for the irrigation of a little more than a million acres of land.

All but about 175,000 acre-feet of the surface waters that we are entitled to are committed to existing or authorized uses. Much of that committed has not yet been put to beneficial use. We can expect substantial stimulation of our economy as the waters made available by Navajo Dam, the Navajo Indian Irrigation Project, the San Juan-Chama Project, the Animas-La Plata Project, the Hooker or Conner unit of the Central Arizona Project and the Interstate Stream Commission's Ute Dam and Reservoir Project are applied to the intended beneficial uses.

A planning report completed by the U. S. Bureau of Reclamation and the New Mexico Interstate Stream Commission in 1975 estimated that for the medium 2020 population projection of 2.7 million the depletion requirement will be 3.78 million acre-feet annually and that the amount of water available for depletion in 2020 will be only about 3.15 million acre-feet annually -- a shortage of 630,000 acre-feet.

As do some other western states, New Mexico faces the problem of taking care of growing municipal and industrial demands with a fixed and limited supply of water. The only practical solution with current technology is a change in the pattern of use.

In New Mexico a water right is a property right. The property right in a water right is what the attorneys call a "usufruct," a right to use the water - the water right owner doesn't own the corpus of the water. The water still belongs to the state as trustee for its citizens. The water right owner in effect has a franchise.

In New Mexico, water rights can be bought and sold and the right to change the point of diversion and place and purpose of use is an intrinsic part of of the owner's property right, if the change can be made without impairing or detrimentally affecting any other water right. Under this law, water rights are available in the market place and will tend to move to the uses of highest economic value. It has been aptly said that, "water will flow uphill to money." The cities, the counties and the State have the power to condemn water rights at fair market value for public purposes. Industries do not have this power and must negotiate with the owners of water rights.

An acre-foot of water depleted in an urban-industrial culture such as that existing in the Albuquerque area, will support about 70 times more people than an acre-foot of water consumed in an irrigation economy, such as will be created by the 110,630 acre Navajo Indian Irrigation Project under construction by the Bureau of Reclamation in San Juan County.

As industrial activity and our population increase, irrigation water rights can be acquired and transferred to meet the growing municipal and industrial water requirements. An acre-foot of water applied to municipal and industrial use generally creates economic values much higher than are created by the use of the same amount of water in irrigation; municipal and industrial officials should be able to be generous in their negotiations with the owners of irrigation water rights.

Grossly generalizing, it can be said that a 15% reduction in our irrigation economy would provide the water needed to nearly double the present economy based on municipal and industrial usage.

Obviously, meeting growing municipal and industrial needs by decreasing irrigation usage implies some consequences for New Mexico's traditions, environment and way of life; hopefully, those consequences would not be unacceptable for they may be unavoidable.

A total of about 100,000 acres of Indian lands are being irrigated in New Mexico. When the Navajo Indian Irrigation Project is fully completed, that total will increase to about 160,000 acres. In our projections of where and when irrigation water rights might be transferred to meet the growing municipal and industrial requirements, we have assumed that irrigated acreage on Indian land, including the lands of the Navajo Indian Irrigation Project, would not be available for the reason that the Indians would want to preserve their agrarian way of life and that those rights would not be subject to condemnation for public purposes. The assumption may not be valid, but that result would be welcomed by many of our non-Indian citizens.

None seems to dispute that the quantification of Indian water rights is essential to the wise use and management of the resources of the western states and that such quantification becomes critical as water uses approach the limit of the supply. Quantification of the Indian rights surely is as important to Indians as to non-Indians; both need to be able to contemplate and plan for the future. While Indian rights to the use of water in New Mexico have been quantified only to a limited extent by federal contracts, New Mexicans fully recognize that Indians have water rights and water needs. In 1980 the New Mexico Indian population was 8.2% of the total state population and Indian lands comprise 9.4% of the State's total area of 121,666 square miles. But about 20% of the renewable water supply to which the State is entitled is either being used or is committed to use on Indian lands.

Quantification of Indian water rights by litigation is the course usually taken. In some situations, it may be the only practical course even though it must be expected to be protracted. The Nambe-Pojoaque stream system adjudication in New Mexico involving four Pueblo Indian tribes was filed in 1966 and its ultimate resolution may still be years away.

Protracted uncertainty resulting from adopting the course of litigation, or failure to address the issues in any way, could be as damaging to a claimant as an adverse ruling; that is, even the wrong answer is sometimes better than none. Negotiation to resolve controversy between friends and neighbors should be preferred over litigation and should be given most careful consideration in the quantification of Indian water rights. But negotiation implies give and take; money and/or water would seem to be the *sine qua non* for negotiating the quantification of water rights. New Mexico, like some of the other western states, has little of either.

Virtually all of the waters of New Mexico's streams are fully appropriated by beneficial use or committed to projects currently being developed under rights held under State law. As I understand the matter, the State could not, in dealing with an Indian tribe, negotiate away rights held under State law without compensating the owner of those rights.

Where both water and money are available, settlements such as those reached with the Ak Chin and Papago Tribes in Arizona are possible; but even in such situations the result may not be entirely satisfactory to all interests. It is noteworthy that the United States recognized some obligation in those settlements and contributed funds to meet that obligation, at least in part if not fully.

Prospects for a negotiated settlement should be favorable in situations where water is available to develop a feasible project for the benefit of Indians.

New Mexico, in accordance with State law, allocated to the Secretary of the Interior rights to about three-fourths of the State's annual entitlement of 727,000 acre-feet of depletion under the Colorado River compacts for development of the Navajo Indian Irrigation Project, the San Juan-Chama Project, and contracts for municipal and industrial water requirements from the Navajo Reservoir supply. In negotiations to formulate the legislation authorizing the projects (P.L. 87-483, June 13, 1962) the Navajo Tribal Chairman, Paul Jones, insisted that the legislation provided for the proportionate sharing of shortages among all those using water under the Secretary's rights. Chairman Jones' reasoning was that if municipal and industrial water contracts from the Navajo Reservoir supply could be served only after the requirements of the Navajo Indian Irrigation

Project had been fully met, the uncertainty of water supply would discourage industrial development on the Navajo Reservation that was badly needed to provide employment and a decent standard of living for the growing population of the Tribe.

The testimony of representatives of the Tribe at hearings on the legislation made clear the Tribe's recognition that by urging such a requirement for the sharing of shortages they were in effect relinquishing, or qualifying, their rights under the Winters Doctrine for the water needed for the Navajo Indian Irrigation Project. The wisdom of the Chairman's reasoning was quickly recognized by representatives of the State. The legislation was enacted with the shortage sharing provision urged by the Navajos. Despite the favorable outcome of this negotiation, we are presently engaged in an adjudication suit, filed in November of 1975, to adjudicate all of the water rights in the San Juan Basin in New Mexico, including the rights of the Navajo Tribe.

The Secretary of the Interior also holds water rights under New Mexico law sufficient to accommodate uses in New Mexico from the authorized Animas-La Plata Project (Public Law 90-537, September 30, 1968). This project would serve the Southern Ute Tribe in Colorado and the Ute Mountain Ute Tribe in Colorado and New Mexico, and possibly the Navajo Tribe, as well as non-Indians.

The Southern Utes were seeking a quantification of their water rights in a suit in the State Court in Colorado. Leonard Burch, Chairman of the Southern Ute Tribal Council, has testified before committees of the Congress that the Tribe would accept its allocation of water from the Animas-La Plata Project as full satisfaction of the Tribe's Winters Doctrine rights and the suit has not been actively prosecuted. Chairman Burch has wisely said that the tribe would rather have wet water than the paper rights they might be decreed in court. The Executive Department's budget proposals have not yet included funds to initiate construction of the Animas-La Plata Project and the Congress has not appropriated funds for that purpose. I have been told that Chairman Burch has recently advised the Justice Department that the Tribe wants to reactivate and vigorously press litigation to quantify its rights.

The Nambe Project is a unit of the San Juan-Chama Project authorized by the same act that authorized the Navajo Indian Irrigation Project. The Nambe Project was designed and has been constructed to serve not only the non-Indians but the four Pueblos using the waters of the Nambe-Pojoaque stream system by making available a full supply for the uses existing at the time of authorization in 1962. Nonetheless, the suit to adjudicate rights in that system that was filed in 1966 still seems years away from final resolution.

Thus far, we in New Mexico are not sanguine about prospects for the settlement of Indian water rights issues by the development of water projects that would benefit Indians as well as non-Indians.

It is, of course, possible to reach negotiated agreements on some issues in the context of litigation. For example, seven of the ten adjudication suits pending in New Mexico that involve Indian water rights are in the Federal court system. Counsel for the tribes contended for that jurisdiction and the attorneys representing the State found it unproductive to spend years litigating the provisions of the McCarran Act to win State court jurisdiction. Furthermore, we believed that justice can be found in both the state and Federal courts. Not all attorneys for non-Indian defendants agree.

It is possible, of course, for the State as the plaintiff in an adjudication suit to stipulate with Indian tribes or non-Indian water users as to their water rights, but such a stipulation remains open to challenge by any other defendant.

Some issues may be amenable to negotiation among the tribes. Three tribes, the Ute Mountain Ute, the Jicarilla Apache, and Navajo tribal reservations are involved in the San Juan Basin adjudication suit in New Mexico with reservation creation dates of 1895, 1887 and 1868, respectively. Claims asserted on behalf of the tribes are very broad and not yet well defined; but it seems likely that they are irreconcilable. The fact that each of the tribes is represented by the Justice Department might facilitate negotiation.

The flood of water rights litigation in New Mexico, and I believe in other western states, has overwhelmed the State's personnel and financial resources. Furthermore, non-Indian defendants are confronted with litigation costs so high that they are not able to competently defend their rights against the virtually unlimited resources made available to defend the Indian and other Federal water rights claims.

Bearing in mind that the uncertainties and the potential for profound consequences to the general welfare and development of the western states that are implicit in Indian water rights litigation arise entirely out of Federal law, the Congress reasonably can perceive a Federal responsibility. The Congress could:

a. Establish a water rights adjudication fund under the control of the Secretary of the Interior; moneys from this fund could be expended by Federal or state entities in preparing nonpartisan evidence for water rights adjudication suits filed in Federal or state courts;

b. Direct the Department of Justice to undertake to establish, by agreement with the States, the priorities in prosecuting water rights adjudication suits; moneys in the adjudication fund could be spent only on the agreed upon priority suits; and

c. Authorize the state and Federal courts to tax reasonable Indian or private non-Indian litigation costs against the adjudication fund.

The Congress has already taken an important step in this direction by appropriating $450,000, through legislation initiated by Senator Domenici, to pay litigation costs of non-Indian defendants in the Nambe-Pojoaque adjudication suit in New Mexico (P.L. 98-1066, Nov. 28, 1983).

Mr. MUYS. Thank you, Mr. Reynolds. I know that Senator Wallop's hope is that we take the first step in reaching some agreement on the nature and scope of the problem and trying to figure out collectively where we might go from here, if anywhere.

I meant to mention, Mr. Steele, when you were finished the record in this workshop will be kept open for 2 weeks following today so panelists or indeed anyone in the audience that would like to submit a statement I am sure Senator Wallop and his staff will be pleased to receive them within the next 2 weeks if you want to put something in the record of the workshop.

Mr. Kyl?

STATEMENT OF JON KYL, ON BEHALF OF THE SALT RIVER PROJECT, PHOENIX, AZ

Mr. KYL. Thank you, Mr. Moderator. If any subject should bring us together, I submit it is management because when it comes to a scarce resource like water, we are all in the same boat.

Streams and aquifers know no political boundary. The problem this morning was carefully articulated by Craig Bell through recitation of statistics from a study which I would like to reiterate to some extent and to build upon because it demonstrates the magnitude of the problem of management which we are facing.

The study indicated that as a percentage of stream flow, our usage exceeds 80 percent in every Western State. In dry years, it exceeds 100 percent, and in average years, our usage exceeds 100 percent in over half of the States.

In my own State of Arizona, usage exceeds supply on the major river systems by over 300 percent even in average years. The difference, of course, is made up by mining ground water.

There is no more unappropriated water. It was this ground water land that caused Arizona to adopt a comprehensive ground water management act 4 years ago. Under that act, withdrawals of ground water will gradually be constricted in order to ultimately achieve a balance between water usage and recharge. The act does not currently apply to Indian reservations, though many of the aquifers requiring active management underlie both Indian and non-Indian lands.

When potential Indian reserved plains are superimposed upon existing water supplies, a disturbing picture emerges. Estimates are necessarily very difficult, but using primarily a standard of practicably irrigable acreage, this study, which again was for the Western Governors Policy Office, concluded that almost 46 million acre-feet of potential claims exist in the 15 western States. That is 3½ times the flow of the Columbia River. It is 1½ times the entire storage capacity of either Lake Powell or Lake Meade.

Now the reason I dwell upon this is because over two-thirds of those potential claims are in my State of Arizona, a figure which, as was pointed out this morning, represents 10 times the available supply. This is why we need management.

There are three basic methods which have been described this morning, and just recently, for both determining and managing water rights.

First, particularly in the certain situations, negotiations offer at least a partial solution, but as pointed out, without some kind of Federal support, it is unlikely that very many people will agree to negotiate in the near future. Where numerous comprehensive water adjudications are being used to determine relative water rights, these will increasingly occur in State courts as a result of the Supreme Court recent decision in *Arizona* v. *San Carlos Apache Tribe*, and that is a point worth remembering in a moment when we speak about management.

The third alternative, of course, is one which Mr. Reynolds just alluded to, and that is some form of Federal legislation. How we determine water rights will influence how they will be managed.

This is the other critical point which I would like to make. It is our role here to focus upon the appropriate management system, and I submit that there are really two basic management options. First is either State or Federal court administration of a judicial decree, and in view of the fact that the *San Carlos* case has paved the way for State courts as an adjudicator of Indian water rights, I submit that under this first option we will find management of both Indian and non-Indian water, as a result of these State court adjudications.

Therefore, they will be included in decrees and be administered by the State courts and administrative agencies.

The second option is a federally legislated program which could rely on State or Federal management, or a combination of the two. Federal management could include an aspect of tribal management with respect to negotiated rights. They rely or must rely on either Federal legislation or a judicially enforced decree or both for the administration of the rights once negotiated.

Management of resources necessarily includes submission to some authority. That is what occurs under a decree. That is also what the Arizona ground water users did when they supported State-legislated management. The theory is that it is ultimately more important to preserve the total resource for the common good than to insist on all incidents of one's legal rights, particularly where those incidents have not been clearly defined and one is forced to litigate the parameters of the incidents not knowing whether one will win or lose.

Now this can be done either voluntarily by supporting some type of legislative program, or it can be imposed through a judicial decree and its administration, but a basic principle of water law is that water rights must be administered through a unitary system. It is impossible to have two separate jurisdictions both attempting to exercise control over a common resource and decree.

In the *San Carlos* case the Supreme Court admonished against, and I will quote, duplicative, wasteful, and consistent dispositions of property by dual systems. The court said, "We have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings."

State management of Indian and non-Indian rights is authorized through the McCarren amendment's waiver of the Federal Government's sovereign unit both as adjudication and administration of decrees. The term "administration" is explicitly set forth in the McCarren amendment, and this policy is in accord with over a century of Federal deference to State water law, and finds judicial recognition and confirmation in recent decisions such as the *United States* v. *New Mexico* and *Arizona* v. *the San Carlos Tribe*.

Therefore, the first option for management is under State statute, enforcing comprehensive decrees. This is what will happen in most areas if we rely upon litigation to determine our water rights. Most of the Western States have statutes which provide State machinery to assist in the judicial and administrative supervision of decrees. They are, therefore, especially well equipped to manage the resource once relative rights have been determined.

Moreover, the Supreme Court has emphasized that it will be quick to redress any wrong to Indians as a result of State adjudications. Nevertheless, State management under federally legislated quantification which includes some Federal or tribal role may have advantages over a purely State program where Indian water rights are concerned.

Indian tribes will undoubtedly be reluctant to submit to State management, but under a federally legislated program they would at least have the opportunity to provide for some Federal or tribal role which they may not have or which may not exist under administration of a McCarren amendment water decree from State court.

Under the Arizona Ground Water Act, local areas have key responsibilities in developing and effectuating the overall State plan and local jurisdictions have wide latitude to determine how best to meet the goals which the State plan establishes. There is no reason that Indian tribes cannot be accorded the same or even greater latitude.

In that regard, Dan Decker's comment about tribal management consistent with the State plan is of interest to me. Where Indians and non-Indians are drawing from the same water sources it is critical that management be conducted under a unitary program and to me that is the key. Dispute resolution must exist in one place and I submit that based upon the *San Carlos* case, that is in the State courts.

The Supreme Court in that case described some of the problems that would result from attempts to exercise concurrent Federal and State jurisdiction, and I want to quote here. The Court said:

> Since a judgment by either State or Federal court would ordinarily be res judicata, the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the issue first, a race contrary to the entire spirit of the McCarren amendment and prejudicial to say the least to the possibility of reasoned decisionmaking by either forum.

Therefore, while some responsibilities for management can be shared, the ultimate jurisdiction to resolve disputes should be in a single forum, and it seems to me that the relative magnitude of the State interest and expertise as well as long-standing Federal policy requires that that jurisdiction be in the State courts.

Whatever differences we may have about matters of jurisdiction, however, I hope we can all agree that cooperation in water management is essential for as I said in the beginning, when it comes to our future water supply, we are really all in the same boat.

[The prepared statement of Mr. Kyl follows:]

Testimony of JLK
6/19/84

If any subject should bring us together, is is the subject of managing our most precious resource, water. Streams and aquifers know no political boundaries.

I will first briefly outline the magnitude of the problem as I see it. I will then address alternative approaches to management.

Determination of water rights is integral to management of the resource. However, since the morning panels have focused on the options for determination of water rights, I will discuss them only in connection with management. The statistics I am about to cite demonstrate the need both to determine rights and manage the resource. Quantification and adjudication of water rights are now receiving a great deal of attention, but since water rights without water are useless, I submit we must focus considerable attention on water use and management.

The problem in the Western states is already critical. A December 1983 study for the Western Governors' Policy Office by the Western States Water Council shows that average water use (as a percentage of stream flow) exceeds 80% in every Western state. In dry areas, it exceeds 100%. In average years, over half of the states experience usage over 100%. In my own state of Arizona, usage exceeds supply on the major river systems by over 300%, even in average years. The difference, of course, is made up by mining groundwater -- there is no more unappropriated water. It was this groundwater mining that caused Arizona to adopt a comprehensive groundwater management act in 1980. Under the Act, withdrawals will gradually be constricted in order to ultimately achieve a balance between usage and recharge. The Act does not currently apply to Indian reservations, though many of the aquifiers requiring active management underly both Indian and non-Indian lands.

When potential Indian reserved claims are superimposed on existing water supplies, a disturbing picture emerges. Estimates are necessarily very difficult, but using primarily a standard of practicably irrigable acreage, the study referred to earlier concluded that almost 46 million acre feet of potential claims exist. That is 3-1/2 times the flow of the Colorado River. It is 1-1/2 times the total storage capacity of either Lake Powell or Lake Mead. Over 2/3 of the potential claims are in Arizona -- a figure representing ten times the available supply.

In other words, not even all potential Indian claims could be satisfied, let alone any non-Indian uses. The inevitable conflict that will occur between existing uses and Indian claims and among competing Indian claims may well cause a reappraisal of the standard for quantifying Indian reserved claims defined in Arizona v. California. In any event, it is important to the further development of Indian and non-Indian economics that conflicts over water rights be resolved in a final, binding way and that all users be subjected to management.

How we determine water rights will influence how they will be managed. Three general methods for determining and managing water rights have previously been discussed. First, particularly in discrete situations, negotiations offer at least a partial solution, though, without federal support, negotiations are unlikely to produce results. Where numerous interests are at stake, comprehensive water adjudications are being used to determine relative water rights. These will increasingly occur in state courts as a result of the Supreme Court's recent decision in Arizona v. San Carlos Apache Tribe. The third alternative, of course, is some form of federal legislation.

It is our role to focus on the most appropriate management system, rather than on quantification. There are really two basic management options: (1) state or federal court administration of a judicial decree or (2) a legislated program which could rely on state or federal management or a combination of the two. Negotiated settlements may resolve rights, but must rely on either federal legislation or a judicially-enforced decree or both for administration of the rights negotiated.

Management of the resource necessarily includes submission to some authority. That is what occurs under a decree. That is also what Arizona groundwater users did in supporting state-legislated management. The theory is that it is ultimately more important to preserve the total resource for the common good than to insist on all incidents of one's legal rights. This can be done voluntarily in supporting legislation, or it can be imposed through a judicial decree and its administration.

A basic principle of water law is that water rights must be administered through a unitary system. It is impossible to have two separate jurisdictions both attempting to exercise control over a common resource and decree. In the San Carlos case, the Court admonished against "duplicative, wasteful . . . and inconsistent dispositions of property" by dual systems.

The Court said, ". . . we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings."

State management of Indian and non-Indian rights is authorized through the McCarran Amendment's waiver of the federal government's sovereign immunity both as to adjudication and administration of decrees. This legislative policy is in accord with over a century of federal deference to state water law, and finds judicial recognition and confirmation in recent decisions such as U.S. v. New Mexico and Arizona v. San Carlos Apache Tribe.

Therefore, the first option for management is under state statutes, enforcing comprehensive decrees. This is what will happen in most areas if we rely on litigation to determine water rights. Most western states have statutes which provide state machinery to assist in the judicial and administrative supervision of decrees. They are, therefore, especially equipped to manage the resource once relative rights have been determined. Moreover, the Supreme Court has emphasized it will be quick to redress any wrong to Indians as a result of state adjudication. Nevertheless, state management under a federally-legislated quantification program, which includes some federal or tribal role, may have advantages over a purely-state program where Indian rights are concerned.

Indian tribes will undoubtedly be reluctant to submit to state management, but under a federally-legislated program, they would at least have the opportunity to provide for some federal or tribal role, which may not exist under administration of a

McCarran Amendment state water decree. Under the Arizona groundwater act, local areas have key responsibilities in developing and effectuating the overall state plan, and local jurisdictions have wide latitude to determine how best to meet the goals established by the state plan. There is no reason Indian tribes could not be accorded the same or even greater autonomy. Where Indians and non-Indians are drawing from the same water sources, however, it is critical that management be conducted under a unitary program with dispute resolution in state courts. The Supreme Court in San Carlos described some of the problems that would result from attempts to exercise concurrent federal and state jurisdiction:

> Moreover, since a judgment by either [state or federal] court would ordinarily be res judicata in the other, the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the issue first - a race contrary to the entire spirit of the McCarran Amendment and prejudicial, to say the least, to the possibility of reasoned decision-making by either forum.

Therefore, while some management responsibility can be shared, the ultimate jurisdiction to resolve disputes must be in a single forum. Clearly, the relative magnitude of state interest and expertise, as well as long-standing federal policy, requires that such jurisdiction reside in state courts.

Whatever differences we may have about matters of jurisdiction, however, I hope we can all agree that cooperation in water management is essential; for when it comes to our future water supply, we are all in the same boat. The advantage to such cooperation is summed up in the resource document of the May 1984 Morrison Institute conference on Water Resources Planning for Arizona: "Integrating Indian development and water uses into a state and regional resource system, rather than divisive hostility and competition, will allow development by both Indian and non-Indian interests in a mutually supportive and . . . effective manner.

Mr. MUYS. Thank you, Jon. We will move to the Department of the Interior, Mr. Furman.

STATEMENT OF HAL FURMAN, DEPUTY ASSISTANT SECRETARY FOR WATER AND SCIENCE, DEPARTMENT OF THE INTERIOR

Mr. FURMAN. Thank you very much. It is a pleasure to be here today, and I am representing the Department of the Interior, specifically the Department's Bureau of Reclamation.

As most of you know, our agency has been involved in numerous issues related to Indian water rights for many, many years. Interior has a trustee responsibility for Indian water rights involving many of the Interior agencies.

We recognize that the Indian tribes are seeking to determine the exact amount of their water rights and to establish accountability of such rights so as to preclude further non-Indian diversions of water, rightfully theirs for without their consent.

In the past, Interior has wrestled with various aspects of Indian claims of water rights and entitlement violations. We have represented tribal claims through referrals to the Department of Justice, directed the recognition of Indian claims by agreements such as the middle Rio Grande project and the six southern pueblos in New Mexico, and we have provided for the management of water projects such as the San Juan Chama Project, also in New Mexico.

The Bureau of Reclamation manages and develops water resources throughout the 17 Western States. In many cases, this resource serves both Indians and non-Indians. Interior has constructed several irrigation projects for various Indian tribes only and several other projects where there are Indian and non-Indian beneficiaries. All of these projects provide storage and conveyance facilities which permit use of water that otherwise would not be available.

Many of these projects are multipurpose in nature, providing water for Indian entitlements for agricultural production, M&I uses, recreation, fish and wildlife, and energy development. In some instances, the Indians are using or proposing to use the entitlement for development. In other instances they propose to sell their entitlement to a non-Indian user and use the revenue for other community purposes.

Although there are currently limitations on use under the Winters doctrine, we, the Department of the Interior, are willing to look at a broad range of settlement agreements that would serve the Indians and non-Indians alike. Hopefully this wider range of alternative uses of water available to Indians may prove to be beneficial to all involved. The number of pending lawsuits and claims relating to Indian water rights are considerable. The economic aspect of these suits upon non-Indian users and irrigation districts as well as upon crop production could be substantial.

In order to determine the extent of the problem, the Department of the Interior has undertaken to ascertain a number of pending cases—the projects involved, the Indian claims to reserved water rights, and the history of these claims. The parties involved in this process include the Indian tribes themselves, the Bureau of Indian Affairs, the Bureau of Reclamation, the irrigation districts, the municipal water supply districts, public utilities, cities, towns, States, and private agricultural and industrial water users. With the exception of a few cases in which a State has initiated court action in order to define Indian and Federal reserved water rights affecting the State water resource plan, the majority of the claims has been made by the Indians themselves. There is a wide variety of cases.

For example, one suit seeks a decision on water for extended reservation boundaries, while another seeks to convert agricultural water to some other use such as fishery enhancement or coal development. In the past, the courts have determined the Indians' reserved right and directed Interior to respond with measures such as financial settlements, inclusion in water projects, rehabilitation and betterment projects, or some other form of reimbursement. It is important to remember that the court decision itself is only the first step in the final settlement, and I think that we have to always remain cognizant of the fact that what we are trying to achieve is "wet" water and not "paper" water in the form of a court decision.

I think we have to look at proposals including the development of more efficient water management plans, rehabilitation of projects for increased conservation of water, arrangements with cities to recycle waste water for irrigation of lands, and the identification and construction of new water projects and transportation systems to fulfill Indian requirements.

It is imperative that these issues be dealt with in a timely fashion, and I think the Department of the Interior recognizes that fact. The costs of settling these issues in the courts are extremely time consuming, expensive, and arduous. This often results in lasting, unfavorable feelings and a lack of trust among the key parties and often a complete breakdown in communications.

Consequently, Reclamation and others within the Department have been reviewing several organizational alternatives that would provide mechanisms for a negotiated settlement wherever possible.

The serious nature of these issues has been recognized by all parties concerned, and there is no alternative but to act in a timely fashion to help resolve these issues.

Thank you very much.

Mr. MUYS. The Department of Agriculture. Mr. Shelton.

STATEMENT OF STUART SHELTON, OFFICE OF THE GENERAL COUNSEL, DEPARTMENT OF AGRICULTURE

Mr. SHELTON. Thank you, Mr. Muys. I thank the subcommittee and Chairman Wallop for inviting the Department of Agriculture to appear today.

Even though we do not have a program specifically related to Indian water rights, we find that our own programs for our management of our land and programs for the providing of benefits to various individuals, including Indian tribes and their members, often include the issue of water rights and water matters.

I would like to add that my colleague who has now left, Stu Jameson, who was our Indian matters coordinator, wanted me to remind the tribal leaders and members that the Secretary has established an—I will get the title correct—a Native American Working Group within the Department, a group made up of agency representatives who assist the Secretary in assuring that the assistance and programs provided by the Department are available without obstacle to the tribes and their members. You may find that the assistance provided by the Department, particularly technical assistance to promote the use and reduce the waste of water and the soil surveys provided by the Soil Conservation Service may be of some use to the tribes in development of their water resources.

I should add that even though I usually attend water rights meetings interagencywide, and attend and have been attending now 10 years water litigation, the Indian water rights matters are so related to our problems that I am starting to recognize the many faces around the table here as I do at the other meetings.

The Department of Agriculture, particularly through the Forest Service, manages 190-some million acres of land in the United States, and so we find ourselves in the same position as do the tribal leaders and the tribes themselves in managing a resource that is finite and in some ways disappearing.

We have encountered as many problems, as many broken promises, and as many hostile environments as have the tribes. Likewise, some of our less successful cases such as the *United States* v. *New Mexico,* we have led the way in assuring that the reserved water rights doctrine will not have the parameters that some of us thought it might have had and I constantly doff my hat to Mr. Reynolds who has been an able party in these adjudications in teaching us in some ways our shortsightedness.

I would say that litigation indeed has shown us not to be the way. It has been an insightful journey that I have had over 10 years in finding out that the most litigation produces is to support the spending habits of the majority of bar members in the West. I say that with some deference to my colleagues. For the most part, the United States has not received 1 more gallon of water for all our efforts that have been put into litigation, nor have our opponents received 1 more gallon of water. This put some gray hairs on Mr. Reynolds' head, and it is starting to put a couple in mine. My clients, particularly the Forst Service, are increasingly concerned that not only the fiscal cost but the political costs of continued litigation is going to wipe them out. I would say that we have had some refinement of our concept in litigation, and we have seen some of the objectives that we would like to attain.

The term I think used now is wet water. We are starting to see some wet water, but in the end, litigation provides only finality, and often not a very satisfactory finality at that.

Negotiations, somewhat of a whipping boy early on, and then a darling of all us water rights participants, has also had varying degrees of success. We settled the Wyoming adjudication, the big adjudication case as we called it, with a negotiated settlement after a protracted litigation and some great expense on the part of the United States and the State of Wyoming. Even at that, as the ink dried on that agreement, various parties within the State of Wyoming were undermining the same theories on which we relied in achieving that settlement, so I can't say that settlement, particularly settlement of litigation through negotiation, will always provide the finality that we seek, but I will say that it cut the costs down very quickly. It achieved for the Forest Service and for other agencies of our Department a close approximation of the waters that we need to carry out the mandate that Congress has given the United States in managing those lands.

I cannot say that we achieved all the water. Of course, it's no skin off the nose of the Forest Service or the Department because the end users in such a battle are the litigants themselves and the citizens of the United States for the national forests are not run as a profit motive but rather for the use and welfare of the United States.

To that result, I think we are starting to realize some recognition by our colleagues in State and local government that battling the Federal Government for water or being in conflict with the Federal Government for water is not in the best interests, so we get down to possibly protection of water uses, protection of water rights through something close to a negotiated agreement, closer to a compact and maybe requiring congressional approval for both the financing and finality that we need.

The United States, particularly the departments themselves, cannot unilaterally give up what may be Federal property rights. Of course, they may be adjudicated in court through the offices of the Attorney General, but we cannot grant them away. Only Congress can do that, or as they so delegate, and so we look to Congress to provide both the financing and to provide the finality of a firm and final determination of property rights of the United States vis-a-vis the property rights of private appropriators and other water users.

I have seen various attempts at resolving the matter legislatively. We have seen it at a State level and in some ways the States are accommodating those systems so as to include the unique rights of Federal water users, including Indian water rights, but that effort is slow and sparse. As Mr. Reynolds stated in his prepared statement, the State of New Mexico in their State adjudications, they are precluded from recognizing a majority of uses that take place on national forest land which includes the use of instream flows. It is not because of Mr. Reynolds' or any of the other State engineers' hard heartedness. Indeed it is not, but it is just a fact of their life that they cannot recognize the very reason that a lot of the national forests were set up.

It is very frustrating for us to sit around and try to work out a resolution when those basic parameters cannot be agreed upon. Indeed that is the problem we are seeing right now in Montana in trying to resolve through the compact negotiations some resolution of our water rights issues. The position right now is if the water use has not been judicially recognized, then it is not a negotiable item, and indeed if that is the position that will be taken, then we might as well go to litigation, so I am assuming that some greater body, some body composed of a group with the power of Congress could sit down, resolve the issue, and somehow send all the parties on their way to do better use of their time and their resources.

Unfortunately, Congress doesn't have the time for that, nor does Congress have the expertise and what I think is starting to emerge from groups like this is that the people who have to live with the problems—Mr. Kyl and his project group, the tribes, their members, the Federal agencies—will have to sit down, roll up their sleeves, and develop the resolution and present it to Congress and say this is what we have agreed upon. This is what we can come up with. This is a comprehensive but still detailed and regionally specific compromise of all our various property rights and desires.

I believe Chairman Muys was correct that the Federal Government and the Federal Congress has been lax and somewhat at fault in not resolving this earlier on. The issues become more clearly drawn and more severely drawn as time passes, and the costs can only escalate. We in the Department of Agriculture have seen our appropriations in relation to real costs stay somewhat at a standstill, so when someone from a State government suggests to us that we buy water rights and particularly when we buy water rights and put them to use not even recognized under State law it does not seem to us as a very viable alternative.

However, a resolution by Congress of the issue could provide a firm understanding among the parties as to what indeed are the property rights of the United States and how they will be administered.

I would say, to get closer to the point of this particular panel, that the Forest Service and other agencies of the Department, particularly the Forest Service, because of the land management responsibilities, are looking at other ideas, including management to protect the water resource, the water dependent resources on Federal lands, particularly the Forest Service's land management authorities. Private parties may not come upon, unless they have an otherwise congressionally granted right-of-way, may not come upon Federal lands and make use of water resources there without the congressionally delegated authority that the Forest Service exercises.

In doing so, the Forest Service takes into consideration the impacts of the project, the diversions and the structures themselves and the environment, the total resource base. The authority of the Forest Service to condition the use of those waters and the installation and construction and maintenance of those works has been upheld by the 10th circuit.

For the most part, the Forest Service finds itself in a rather enviable position in that most of the forests are set up at the top of the watershed. Indeed that was their primary purpose as recognized by the Supreme Court, and so control of the headwaters and control of the waters down to the borders pretty much assures that the waters will provide their benefit to the forest until such time as they leave the forest boundary. However, we do have forests in which the streams meander from the top through the forest where the watershed is somewhere above the national forest, and in those there are other management responsibilities.

Indeed the Forest Service comments and this responsibility can be shared by the tribes. When the Forest Service comments on the EIS process, the environmental impact statement process, that a Federal agency undertakes because of a project that would be built on the agreement that would affect the national forest, we have a statutorily protected opportunity to integrate our resource concerns into the planning of that project.

Likewise the application by a water project seeker or proponent under the Federal Power Act includes certain powers that the Department of Agriculture enjoys along with the tribes in protecting resources dependent upon water from their effect by the water resource project.

Mr. **Muys.** Mr. Shelton, I am going to have to ask you to maybe come to a conclusion.

Mr. **Shelton.** I will come to a close very quickly. I would like to close on that point. I apologize for rambling. The latter point is the most recent decision in *Escadita Water Co.* case, the Mission Band of Indians in that court recognized the authority of the Secretaries of Interior and consequently Agriculture to impose certain conditions under the 4(e) of the Federal Power Act on FERC licensed projects.

I would suggest to the tribes and their counsel that they go to bed with the decision and read it because further in the opinion, the court opinion written by Justice White, it indicates that 160 SC section 803A includes a duty and responsibility upon the commission to recognize areas downstream or otherwise affected by the project and to impose conditions to protect those areas, including in that case several Indian tribes which were not on land contiguous to the project and which did not have at that time adjudicated water rights, and so we are finding management schemes or management ideas separate from water rights issues that protect the same resources for which a water right would be sought.

I appreciate the time.

Mr. **Muys.** Thanks very much. Mr. Allen for the Corps of Engineers.

STATEMENT OF RON ALLEN, ASSISTANT CHIEF COUNSEL, U.S. ARMY CORPS OF ENGINEERS

Mr. **Allen.** Mr. Moderator, I would just like to reemphasize the point I made this morning. The Corps of Engineers has had a very limited direct involvement with water rights issues.

We appreciate that the exercise of the water rights can affect and be affected by the corps water resource development activities, and that it is important that we continue to participate with all affected parties toward mutually acceptable solutions to the exercise of sovereign and private rights to essential water resources, and now I would like to yield the balance of my time to the people to my left if I could.

Mr. MUYS. Very good. Mr. Mike Dwyer for the North Dakota Water Users Association.

STATEMENT OF MICHAEL A. DWYER, EXECUTIVE VICE PRESIDENT, NORTH DAKOTA WATER USERS ASSOCIATION

Mr. DWYER. Mr. Moderator, I will make my comments short as well.

In order for any kind of management to be effective, as Mr. Reynolds has indicated, quantification of water rights is necessary. I just would like to share with you briefly what the State of North Dakota is doing and its position with respect to this issue.

The North Dakota State Water Commission is a State agency assigned the authority and responsibility for developing North Dakota water resources for the benefit of its citizens.

The North Dakota State engineer is a separate State agency assigned the authority and responsibility of regulating the allocation of North Dakota's water resources through the granting of water permits from both surface and ground water sources. The nature of Indian reserved water rights creates uncertainty in North Dakota, and that uncertainty must be clarified in order for management to be effective.

In North Dakota the primary focus of this uncertainty is the Fort Berthold Indian Reservation through which the Missouri River flows, and the Standing Rock Indian Reservation adjacent to the Missouri River. Federal reservoirs created under the Missouri River Pick-Sloan plan affect both Indian reservations. In addition to State water development issues, the Missouri river presents significant interstate issues which heightens the uncertainty created by reserved water rights.

The North Dakota State Water Commission and three affiliated tribes of the Fort Berthold Indian Reservation have officially and formally entered into negotiations to quantify the reserved water rights of the three affiliated tribes. Private water development interests in North Dakota support this approach. The support for this approach is based on certain issues that are an inherent part of the negotiations.

First, the State of North Dakota, from a regulatory standpoint and private water development interests in North Dakota from an economic standpoint, need to know the total State water usage. Thus negotiations to quantify the reserved water rights of the Fort Berthold Indian Reservation will include a review of an integrated management system so that the planning and regulation of water usage will be complete. This integrated management system which at the minimum would simply be a sharing of documented water uses but which hopefully involve joint planning and even joint efforts, could be very helpful in alleviating economic risk and increasing the effectiveness of any substantial investment for non-Indian water development activities.

Second, the Indian tribes along the Missouri River are in our view in the same position as upstream States in the Missouri River Basin. The Missouri River Basin Pick-Sloan plan embodied in the 1944 Flood Control Act provides for the comprehensive development of the Missouri River. This compromise agreed to by the States of the Missouri River Basin includes the O'Mahoney-Milliken amendment, which provides that beneficial consumptive uses in upstream States shall have priority over navigation below the 98th meridian. Indian appropriations of the Missouri River will create as much concern to the States of Missouri, Nebraska, Iowa, and Kansas as the recent proposal by South Dakota to sell water to ETSI. While the legal issues are not the same, the political and practical realities are identical.

Third, our negotiations in North Dakota, if they are to be successful, must follow closely the legal principles already set forth by the courts. Negotiation is not a proper vehicle to expand Indian reserved water rights and should not be considered in that light either by the State or by an Indian tribe. Negotiations which maintain a legal basis should be upheld in any ultimate apportionment or division of the Missouri River. Only by applying existing legal principles will the uncertainties of Indian reserved water rights be removed through negotiations.

Fourth, we must develop a way for the Federal Government in its trust capacity to be involved in the negotiations and to be bound by the results of the negotiated settlement. Failure to ensure that the Federal Government as trustee for the tribes is bound to the negotiated settlement renders the negotiations meaningless.

In conclusion, while we support quantification of Indian reserved water rights through negotiations, the negotiations must be realistic, complete, and to the extent that they are settled, they must be based on existing principles of law. Otherwise there is no long-term benefit of such quantification and the uncertainties could be better resolved through litigation, which as we have heard is not a very attractive alternative.

That concludes my presentation.

[The prepared statement of Mr. Dwyer follows:]

STATEMENT BY MICHAEL A. DWYER, STATE OF NORTH DAKOTA BEFORE THE SUBCOMMITTEE ON PUBLIC LANDS AND RESERVED WATER RIGHTS OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

JUNE 19, 1984

Mr. Chairman and members of the subcommittee, I am the Executive Vice President of the North Dakota Water Users Association, which is comprised of grassroots, private water development interests in North Dakota. I am also a Special Assistant Attorney General for the State of North Dakota for various water-related matters. I have been involved in the State of North Dakota in the area of Indian Water Rights for approximately seven years, although this certainly does not qualify me as an expert in the field. My testimony today is simply to explain to the committee the position of the State of North Dakota, through its State Water Commission, and the position of private water users in North Dakota, through the North Dakota Water Users Association, concerning the subject of Indian Water Rights, and specifically, the uses and management of water resources in North Dakota as they may be affected by Indian water Rights.

The North Dakota State Water Commission is a state agency assigned the authority and responsibility of developing North Dakota's water resources for the benefit of its citizens. In its capacity as a water development authority, the purposes and views of the North Dakota State Water Commission are in most instances consistent with the objectives of private water development interests in North Dakota. The North Dakota State Engineer is a separate state agency assigned the authority and responsibility of regulating the allocation of North Dakota's water resources, through the granting of water permits from both surface and groundwater sources for all beneficial uses.

With that brief introduction of the role of the North Dakota State Water Commission and the North Dakota State Engineer, it should be clearly understood at the outset that the nature of Indian Reserved Water Rights creates every bit as much uncertainty in North Dakota as in any other state. In North Dakota, the primary focus of this uncertainty is the Fort Berthold Indian Reservation, through which the Missouri River flows, and the Standing Rock Indian Reservation, which is adjacent to the Missouri River. Federal reservoirs created under the Missouri River Pick-Sloan plan affect both Indian reservations. In addition to state water development issues, the Missouri River presents significant interstate issues, which heightens the uncertainty created by Indian Reserved Water Rights.

The North Dakota State Water Commission and the Three Affiliated Tribes of the Fort Berthold Indian Reservation have officially and formally entered into negotiations to quantify the reserved water rights of the Three Affiliated Tribes. Private water development interests in North Dakota support this approach. The support for this approach is based on certain issues that are an inherent part of the negotiations.

First, the State of North Dakota, from a regulatory standpoint, and private water development interests in North Dakota, from an economic standpoint, need to know the total state water usage. Thus, negotiations to quantify the reserved water rights of the Fort Berthold Indian Reservation will include a review of an integrated management system so that the planning and regulation of water usage will be complete. This integrated management system, which at the minimum would simply be a sharing of documented water uses, but which would hopefully involve joint planning and other joint efforts, could be very helpful in alleviating economic risk and increasing the effectiveness of any substantial investment for non-Indian water development activities.

Second, the Indian tribes along the Missouri River are, in our view, the same position as upstream states in the Missouri River Basin. The Missouri River Basin Pick-Sloan plan, embodied in the 1944 Flood Control Act, provides for the comprehensive development of the Missouri River. This compromise agreed to by the states of the Missouri River Basin includes the O'Mahoney-Milliken amendment, which provides that beneficial comsumptive uses in upstream states shall have priority over navigation below the 98the meridian. Indian appropriations of the Missouri River will create as much concern to the states of Missouri, Nebraska, Iowa, and Kansas as the recent proposal by South Dakota to sell water to ETSI. While the legal issues are not the same, the political and practical realities are identical.

Third, our negotiations in North Dakota, if they are to be successful, must follow closely the legal principles already set forth by the Courts. Negotiation is not a proper vehicle to expand Indian Reserved Water Rights, and should not be considered in that light, either by a State or by an Indian tribe. Negotiations which maintain a legal basis should be upheld in any ultimate apportionment of the Missouri River. Only by applying existing legal principles will the uncertainties of Indian Reserved Water Rights be removed through negotiations.

Fourth, we must develop a way for the Federal government, in its trust capacity, to be involved in the negotiations and to be bound by the results of the negotiated settlement. Failure to ensure that the Federal government, as trustee for the Tribes, is bound to the negotiated settlement renders the negotiations meaningless. If anything short of Congressional approval is not legally sufficient, then we must seek Congressional approval. I am not suggesting that Congressional approval is necessary. I am simply stating that we must do whatever is necessary to ensure that the Tribes and its trustee, along with the State, are bound to the agreement that results from our negotiations.

In conclusion, while we support the quantification of Indian Reserved Water Rights through negotiations, the negotiations must be realistic, complete, and they must be based on existing principles of law. Otherwise, there is no long-term benefit of such quantification, and the uncertainties could be better resolved through litigation.

Negotiated settlements for quantifying Indian Reserved Water Rights would be enhanced if Congress were to establish a consistent mechanism, which would have to include the necessary sovereign power and authority, for the negotiation of Indian reserved water rights. This would alleviate the need for the wheel to be re-invented with every separate Indian Tribe. Thank you for the opportunity to present this statement.

Mr. Muys. Thank you, and please, Mr. Baker and Ms. Skye, don't feel rushed. We are just running a little late. We are going to have to limit, perhaps curtail and defer until after the fourth panel questions from the audience, but take your time.

Ms. Skye of the United Sioux Tribes.

STATEMENT OF HARRIET SKYE, UNITED SIOUX TRIBES

Ms. Skye. I am a member of the Standing Rock Sioux Tribe, and I have been asked by the chairman of the United Sioux Tribes Development Corp. to make this presentation to you today, the board of directors and the chairman and president of the respective Sioux Tribes, and this statement has been authorized by Webster Hawk, chairman of the board and president of the Sioux Tribe.

The United Sioux Tribes Development Corp. has been involved in monitoring and defending the water rights of the Sioux for a number of years. Most recently we actively pursued the dismissal of the lawsuit *South Dakota* v. *Rippling Water Ranch* which was an attempt by the State of South Dakota to adjudicate Indian water rights in the western two-thirds of the State of South Dakota. The lawsuit was dropped after 2 years of preliminary efforts on the part of the State, numerous meetings, conferences and legal maneuvering between State and Federal courts.

The Governor and the State attorney announced the reason for dropping the suit was to pursue negotiations which we will discuss later in this statement.

We have actively monitored and presented statements outlining the tribal position on the sale of 50,000 acres of water to the Energy Transportation Systems, Inc., pipeline corporation. Our position has revolved around the fact that tribes were not consulted on the sale of the water and were not in support of the concept advocated by the Governor.

We take the position that water represents the most valuable of all Indian natural resources. The protection, preservation, and ultimate utilization of this valuable resource will determine the destiny of Indian reservations.

We disagree that the State has any part to play in the quantification or allocation of Indian water rights, and that Indian rights to the use of water on the reservations are not created pursuant to State law. They are rights to water reserved to the tribes by the Indians themselves and are based on the treaties prior to any appropriation, rights established by individuals or respective States.

Some courts and other speakers have taken the position that the reservation of water for Indian reservations was created by treaty. It was the Indians and not the United States who reserved the water.

It is our position that Indian water rights apply to all sources—streams, lakes, wells—which arise upon or border, cross or underlie trust lands.

The U.S. Government as legal trustee for Indian lands is also the trustee for Indian water rights. This trustee responsibility has been delegated to the Bureau of Indian Affairs within the Department of the Interior, and it is our contention that because of interagency conflict, politics, and conflicts of interest, they have not been effective in either carrying out this fiduciary responsibility or advocating the development and use of the water resource.

It has been our experience that agencies of Government have sponsored, encouraged, and played a part in taking away Indian water rights, and the Bureau of Indian Affairs has been ineffective in protecting the Indian interests.

In 1944, 40 years ago, Congress enacted the Flood Act for the purpose of controlling on the Missouri River the generation of power and the development of irrigation within the Missouri River Basin. The act itself was reticent on the issue of Indian water rights, but neither did it indicate the adverse consequences that would befall the Indians on reservation lands in pursuit of its development.

Preliminary to the Flood Control Act of 1944, the Bureau of Reclamation and the Corps of Engineers had developed massive plans for the Missouri River Basin. The Corps of Engineers had concentrated on primarily flood control and power generation. The Bureau of Reclamation had emphasized dams and irrigation. In their efforts to get congressional authorization, there was a hurried-up amalgamation of the two plans commonly referred to as the Pick-Sloan coming from the Directors of the two Government agencies responsible.

Even in those early days critics of the Pick-Sloan plan pointed out that it would trample on the rights of Indians. Although the wording of the Flood Control Act was not as ominous as some critics would indicate, there were even some specific benefits detailed for Indians. Specifically 17 irrigation projects were identified and authorized in the act for the benefit of the Sioux. As it turned out, the act itself may not have been threatening, but the procedures for implementing under the leadership of the Corps of Engineers was a devastating blow to the Sioux Indians.

First of all, the land base of the tribes was reduced by 200,000 acres, plus for the purpose of storing the water and building the necessary structures, one dam, the Awahea, destroyed more Indian land than any other public works project in America. Along with this loss of property was the social and economic upheaval of the Indian people who had historically resided on and developed their existence around the river bottomlands, the most valuable lands in their view on the reservation.

The military type or strong-arm tactics used in taking the Indian lands have been cited by many as being illegal in many cases and socially unacceptable in most cases.

It has now been 40 years since the act was consummated and implementation of the Pick-Sloan plan began. The economic benefits that were to accrue to the Sioux who sacrificed their land never happened. Commitments made in the negotiations by the corps and the act itself have been ignored, and the resulting lake and power generation have done little or nothing to benefit the reservation economy. The non-Indian water projects both proposed and under construction ignored the Indian project, both ignored the Indian project, and no Government agency can be expected to take the initiative to defend the aboriginal rights of the tribes.

It is the announced policy of this administration that water rights should be negotiated rather than litigated. The word "negotiation" has an entirely different meaning to the Indian people based on the history of being shortchanged and otherwise deprived in any negotiation process with Big Government. The commitments made in 1944 were the results of negotiations, and none of these were lived up to.

What is to make us think that negotiations today would have any different consequence?

The State of North Dakota and South Dakota have indicated a desire to negotiate. We have nothing to negotiate with the States because the Indian water rights are paramount to theirs, and our treaty is with the U.S. Government. The Winters doctrine provided that the United States is not the beneficial owner of the Indian right. It is a trustee for the benefit of the Indians and its powers and duties regarding Indian water rights are governed by its fiduciary duty to the Indians.

We do not hold to the theory that Indian reserved rights are confined to the need for irrigation. It is our contention that the water rights are applicable to any beneficial use on the reservation. Unfortunately, the Sioux tribes are basically in the same position that they were 40 years ago at the inception of the Pick-Sloan plan when tribal governments lacked expertise, legal or otherwise, to defend their position. No Federal agency can be expected to advocate freely and vigorously the tribal position in any form of negotiation. The term "negotiation" to our way of thinking does not relate to dealing on an equal basis but rather from a disadvantaged position. As one member stated, negotiation means I have something and you want it, particularly in dealing with the agencies of Government or State. This form of negotiation cost the Sioux the majority of their reservation and the Black Hills of South Dakota. There is no reason to believe that negotiation of water would be any more favorable, and the ultimate would be a lawsuit 50 to 100 years from now where the tribe would be offered a pittance of money for the water rights and absconded.

We propose a comprehensive effort to develop water projects to meet the needs of reservations. Further, before any discussions of negotiations, we must have the Government live up to their commitment of 40 years ago and the Flood Control Act of 1944.

Thank you very much.

Mr. MUYS. Thank you, Ms. Skye. Last for this panel is Mr. Chris Baker who is the vice chairman of the Tribal Council of the Southern Ute Tribe.

STATEMENT OF CHRIS A. BAKER, VICE CHAIRMAN, TRIBAL COUNCIL, SOUTHERN UTE INDIAN TRIBE

Mr. BAKER. Thank you. I am Chris Baker, vice chairman of the Southern Ute Indian Tribe. I am appearing here today on behalf of the Southern Ute Tribe. I am grateful for the opportunity to participate in the discussion of the proposed solutions to the difficulties associated with the Indian reserved water rights.

The Southern Ute Indian Reservation is located in southwestern Colorado. Much of the land within the boundaries of the reservation is non-Indian. The lands in our region are semi-arid. Therefore, water for agricultural, domestic and municipal uses are very important. Seven major streams that flow into the San Juan River, a tributary of the Colorado River, cross the reservation.

In 1930 the Federal Government awarded the Southern Ute Indian Tribe the No. 1 water right for the 212 cubic feet of water from the Pine River with a priority date of 1868, and the tribe also owns one sixth of the stored water in the Vallecito Reservoir, a reclamation project on the Pine River.

The Pine River story is important for several reasons. First, in regard to agricultural water, it serves as the precedent and allows our tribe to protect what may happen on other streams.

Second, however, the story shows that participation in major reclamation projects can preserve stable water storage supplies not only for the tribe, but also for non-Indians affected by reserved water claims.

Third, by pursuing water rights and by participating in storage projects, the tribe has guaranteed itself a dependable water supply during even dry years.

Regardless of whether one advocates litigation or negotiation, Indian tribes have an ultimate and critical need for water. In pursuit of that end, the Southern Ute Indian Tribe strongly advocates the construction of the Animas-La Plata Water Reclamation project. This project was authorized for construction by Congress in 1968 concurrently with the Central Arizona Water project. The Animas-La Plata project would provide water storage for numerous municipalities in Colorado and northern New Mexico. It would also supply water to irrigate hundreds of acres of dry farmland in the area. As planned, the Ute Indian Tribe would be allocated 26,000 and some acre-feet of municipal and industrial water located in the reservoir near the tribe's undeveloped coal reserves.

In 1972, the Southern Ute Indian Tribe commenced legal action to quantify their reserved water rights claims, and the tribe has been in a position to litigate those claims now for several years. It has been the position of the Southern Ute Tribe that the Animas-La Plata project when constructed would provide a vehicle for negotiations of at least a portion of our Winters water rights claims.

Our Tribal Council along with ranchers, farmers and Government officials have appeared before congressional committees to obtain appropriations for construction every year since 1968. The State of Colorado, the Native American Rights Fund, the National Congress of American Indians and other organizations have supported the Animas-La Plata project as a means for negotiation.

In October of 1983, the House of Representatives enacted H.R. 3958, the Water Resource Appropriations bill, which appropriated $1.3 million for construction of the Animas-La Plata project. Although the bill was passed by the Senate Appropriations Committee, it has never been submitted for a vote by the full Senate. The Tribal Council is extremely frustrated, and the tribe is losing its patience. We along with our non-Indian neighbors are losing our faith in our Government's leaders.

In order to protect the tribe's reserved water rights claims, we now feel that we must proceed with the litigation that was commenced in 1972. Without the needed water project, initial projections show that our agricultural claims alone will totally curtail non-Indian irrigation on two rivers that cross the reservation. If we are also successful in our municipal and industrial claims, there is no question that the relationship between the tribe and non-Indians will be bitter for a number of years to come, and this is not a very good outlook for the people of our region.

Construction of the Animas-La Plata project would solve many problems and go a long ways to, quote, keep the peace.

Thank you.

[The prepared statement of Mr. Baker follows:]

STATEMENT OF CHRIS A. BAKER
VICE CHAIRMAN, TRIBAL COUNCIL
SOUTHERN UTE INDIAN TRIBE
BEFORE THE SENATE SUBCOMMITTEE ON PUBLIC LANDS
AND RESERVED WATER RIGHTS
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
WORKSHOP ON INDIAN RESERVED WATER RIGHTS
June 19, 1984
WASHINGTON, D.C.

I am Chris A. Baker, Vice Chairman of the Tribe Council of the Southern Ute Indian Tribe. I am appearing here today on behalf of the Southern Ute Indian Tribe. I am grateful for the opportunity to participate in the discussion of proposed solutions to the difficulties associated with Indian reserved water rights. Perhaps the easiest way for me to explain my thoughts is in relation to the situation encountered by my Tribe.

The Southern Ute Indian Reservation is located in southwestern Colorado. As a result of homesteading, allotments, and reorganization, the Reservation consists of tribal lands, non-Indian fee lands, trust allotments, and National Forest Service properties. The lands in our region are semi-arid; and competition for agricultural, domestic and municipal water is keen. Approximately seven major streams that flow into the San Juan River, a tributary of the Colorado River, cross the Reservation. Water from these streams have for many years been used by non-Indians on and off the Reservation. The use of the waters has been generally regulated by the state courts and the state engineer. The one instance in which tribal reserved rights have been adjudicated occurred in 1930 when a federal court awarded the Southern Ute Indian Tribe the number one water right for 212 cubic second feet of water from the Pine River with a priority date of 1868. Perhaps as a result of the entry of that decree, the Bureau of Reclamation constructed a water reclamation project in the 1930s, which now guarantees sufficient stored water to serve the Indian and non-Indian agricultural lands located along the Pine River. Thus, the Southern Ute Indian Tribe possesses an extremely valuable water right on the Pine River, and the Tribe, as a participant in the Pine River Water Reclamation Project, also owns one-sixth of the stored water in Vallecito Reservoir. The Pine River story is important for several reasons. First, in regard to agricultural water, it serves as a precedent, and allows our Tribe to project what may happen for other streams. Secondly, however, the story shows that participation in major reclamation projects can preserve stable water storage supplies not only for the Tribe, but also for non-Indians affected by reserved rights claims. Thirdly, by pursuing water rights and by participating in storage projects, the Tribe has guaranteed itself a dependable water supply during even dry years.

Regardless of whether one advocates litigation or negotiation, Indian tribes have an ultimate and critical need for water. In pursuit of that end, the Southern Ute Indian Tribe strongly advocated the construction of the Animas-La Plata Water Reclamation Project. Partly as a result of the Tribe's efforts, Congress in 1968 authorized the Animas-La Plata Water Project for construction concurrently with the Central Arizona Water Project. The Animas-La Plata Project is a proposed regional project that would provide water storage for numerous municipalities in Colorado and New Mexico. The Project would also supply water to irrigate substantial portions of dry farmland in the Four Corners region. As planned, the Southern Ute Indian Tribe would be allocated 26,600 acre feet of municipal and industrial water located in a reservoir near the Tribe's substantial undeveloped coal reserves. The neighboring Ute Mountain Ute Indian Tribe would also receive agricultural and industrial water needed for their reservation.

As planning and feasibility studies were being conducted for the Animas-La Plata Project, the Southern Ute Indian Tribe and the Ute Mountain Ute Indian Tribe, through the Department of Justice and Native American Rights Fund, commenced a legal action in 1972 to quantify their reserved water rights claims. Soil tests and land classifications were conducted to determine the practicably irrigable acres located throughout our reservations. We have been in a position to litigate those claims for several years. The Tribe, however, has moved slowly with the lawsuit. It has been the position of the Tribe that the Animas-La Plata Project, if constructed, would provide a vehicle for negotiation of at least a portion of our Winter's water rights claims.

With the possibility of negotiation of our reserved water rights, the State of Colorado, the Native American Rights Fund, the National Congress of American Indians, and many major organizations in Colorado have urged Congress to appropriate the funds needed to start construction of the Animas-La Plata Project. Thus, we have attempted to work with our neighbors to achieve our common goal, the actual delivery of water for our uses and the uses of our region. At least one time every year since 1968, Tribal Council members have appeared before House and Senate committees, together with farmers, ranchers, and government officials, to get the water project started. It has been the Tribal Council's position that our active support would be meaningful in obtaining the appropriations needed for the project's construction.

In October of 1983, the House of Representatives enacted H.R. 3958, a Water Resource Appropriations Bill, which appropriated 1.3 million dollars for construction money for the Animas-La Plata project. The same bill contained substantial appropriations for other water projects around the country. Unfortunately, although the bill was passed by the Senate Appropriations Committee, it has never been submitted for a vote by the full Senate. The Southern Ute Indian Tribe is disturbed that the Senate and the Administration have not pursued the construction of the Animas-La Plata Project more vigorously. As things stand now, it does not appear that the powers that be will appropriate money for the water project in the near future.

The Tribal Council is extremely frustrated and the Tribe is losing its patience. Those people in our region who haul domestic water and farm without dependable water supplies are losing their faith in our government's leaders. In order to protect the Tribe's reserved water rights claims, we now feel that we must proceed with the litigation that was commenced in 1972. The chairman of our Tribal Council recently sent a letter to the United States Attorney General requesting that the case be prosecuted vigorously.

In conclusion, despite our efforts to work together with the other entities in our region, we now appear to be forced to litigate our claims in a case that will probably cost in excess of 15 million dollars. Without the needed water project, initial projections show that our agricultural claims alone will totally curtail non-Indian irrigation on two rivers that cross the reservation. If we are also successful in our municipal and industrial claims, there is no question that the relationship between the Tribe and non-Indians will be bitter for many years to come.

Respectfully submitted,

Chris A. Baker, Vice Chairman
Southern Ute Indian Tribe.

Mr. MUYS. Thank you, Mr. Baker. Let's just take a minute. We are running about 20 minutes late, and before we sign out, is there anyone on the fourth panel that really has to leave here at 4:15 to get an airplane or anything, any of our people? There is one. I will see that you are first on the panel, but I think this is important enough that I don't think we ought to squeeze too much.

Let's take 5 minutes or so for some questions and then we will break for 5 minutes and get into the fourth panel. We may run 15 or 20 minutes late. I see no reason to go rushing out of here other than to accommodate people that have to get planes.

Any questions from the audience for any of our panelists? We're not going to let them off the hook that easy.

Your name and organization again?

Mr. BOGGS. Don Boggs with Black Feet—and this gentleman that talked about water management, talking about the State managing the water, now what about the next State down the creek a ways? The water runs to them and they manage their water and then the following State manages their water.

Now what I am getting at, there is borders on those States, you know, and the water leaves the State. The same thing happens to the reservation. The water runs through or off the reservation. Why the hell don't they just leave us alone and let us manage our own thing?

Thank you. I want to say something to the gentleman who was talking about forest, managing forests, and he made the statement that they are concerned with the water because that is where the forests are is at the start of this water, and this is one of my gripes. The water starts on our reservation and 2 miles from the backbone of the Continental Divide, the Forest Service is talking about development of gas and oil. They have got gas wells on the reservation that are sitting there capped. There is more darned gas than we know what to do with, and we can't put it in the lines. They say the lines are full. There is no place to go with it, and yet the Forest Service wants to develop more of this right where the water is born.

It's the sweetest water in the world right there where it starts out, so we can pollute the whole danged country from the source clear to the end.

Mr. MUYS. We will let the Forest Service defend itself.

Mr. SHELTON. I am not familiar with that. I would like to talk to you later about that.

Mr. BUSH. My name is Jim Bush. I would like to respond to Mr. Boggs, the notion that leave us alone, let us manage our own water.

When you leave everybody alone and let them manage their own water, you have got the situation that the Ocachin Reservation is in where the non-Indian farmer put down deeper wells and bigger pumps and created a depression and actually reversed the gradient. The water runs downhill and it went past the Ocachin Reservation.

Those pumps and those deep wells actually reversed the gradient and now it flows away. Now the same thing can happen to Indians on reservations if they want to reverse the gradient flow, and that is why that Mr. Kyl is absolutely correct. You are not going to have any kind of management or conservation until you have a unitary system of conservation and management.

Mr. MUYS. As you know or may know, I am sure Mr. Kyl knows, the Western Governors Association now, formerly WESGO, has got a project under way dealing with that problem with respect to States.

You have common underground water basins intersected by State lines. You have got both States contending with the quickest development, and you have a similar problem, so there has got to be some kind of comprehensive management entity for all kinds of users.

Yes, Mr. Lattin?

Mr. LATTIN. My name is Roy Lattin. I would like to ask Mr. Reynolds a question.

Being I guess you would call it the head engineer for the State of New Mexico water resources, you are probably responsible for the long-range planning and management of the water resources there.

Mr. REYNOLDS. I am the State water boy.

Mr. LATTIN. Right. I would like to ask a question. You are probably one of the main agitators to go ahead and negotiate with the tribes in New Mexico for the water rights, and like the lady said, negotiation means that we got it, we want to know how can I talk you out of it? And so what is wrong with the idea that Indians—you are talking about quantification of water. That is what you are getting at. In the long-range planning you want to know how much you are going to use.

Well, we are going to use 100 percent of that water. We are going to use 100 percent of the acreage on our reservations, so why don't you just kind of plan it for that? Because if you reversed it and we asked you the question, you know, how much of your land are you going to use, you would be a fool if you said I am only going to use half of it. You are going to tell us you are going to use all of it, so in your long-range planning I am sure it will be all the tribes' position that we are going to use all of our water, all of our land.

Mr. **Reynolds.** Your premise is wrong. I am not the chief water person for negotiation. As I said, we can't negotiate. We have no water. We have got no money.

We did negotiate and worked out I think a beautiful deal with the Navajo Tribe where they got 110,630 in irrigation projects at no cost except operation and maintenance. We made them a pretty good deal. We worked on the other water projects over on the other side of the mountain using the San Juan Channel water. We had four, five, six, Pueblo Tribes involved in that.

We are still interested. Negotiation is not always a substitute for litigation. Now if the Indians use anything approaching the claims that they make in litigation, it is going to be I think absolutely necessary for the Federal Government to compensate the Indians for any water adjudicated to them that has already for 100 years been put to use by non-Indians. That is, you may have to resurrect the Indian Claims Commission.

Mr. **Lattin.** My basic premise is still the same, that the tribes' irrigable acreage is 100 percent of our reservation.

Mr. **Reynolds.** With respect to the Navajo Tribe, you raise a good point. A project was planned. It was entirely on the Navajo Indian Reservation. It turned out on the final design that over half of that land was not capable of sustaining irrigation, that it was not practicably irrigable.

For that reason, the State supported the acquisition of Bureau of Land Management lands to be held in trust for the Indians, for the Navajo Tribe, to complete the full 110,630 acre project because there were not sufficient practicably irrigable acreages on the reservation.

The Navajos made a good deal. They had a good man—Paul Jones, chairman of the tribe. We were able to work very well with him. We are still in an adjudication suit that was filed in 1975 involving three Indian tribes, all with I think irreconcilable demands at varying reservation creation dates, and it is my hope that at least the Indians can sit down and negotiate among themselves. With the Justice Department representing all three of them, why one would hope they could do that.

Mr. **Muys.** One final comment by Mr. Kyl, and then we will recess until 25 to 4.

Mr. **Kyl.** Just one short point in reference to the question you just asked, I think it points up something that we all ought to keep in mind.

The time, primarily the time constraints in a situation like this are not sufficient for everyone to be able to identify exactly what their situation is, and that is unfortunate because a lot of things that I talked about, for example, may not be applicable to your particular situation. For example, you may have, all of the water users in your area may have an adequate supply of water to meet their various needs. It may be primarily a matter of cost, so that the water is there but it is a question of who is going to have to pay more for that particular water?

I understand in your area that there is more water available, for example, than there is in the area that I was primarily addressing and that Mr. Reynolds has to deal with.

In the area that I am addressing we end up in the situation where the potential claims are 10 times the amount of water available, so obviously not everyone can have, can assert 100 percent of their rights and expect to be satisfied. Many of the tribes would not be able to have a full resource available to meet their needs, so unfortunately I think we all ought to at least bear in mind the fact that when we speak to the problems, we are speaking primarily from our own particular perspective and our own back yards and just by the nature of things what we say won't necessarily apply to somebody else's problem in their back yard, and it seems to me that this is the kind of meeting that can at least get us all starting to think about the problem so that we can have some future dialog where everyone can get out on the table all of their unique and particular circumstances, and then once that is done, we will understand each others' problems and perhaps be able to get them resolved.

Mr. MUYS. Thanks. We will recess for 5 minutes and come back and talk about possible solutions.

[Whereupon, a brief recess was taken.]

Mr. MUYS. Panel 4, we are going to talk about proposed solutions to some of the problems we have been discussing all day long.

Let me take a minute to introduce our panelists. We had several substitutions for the participants indicated on the formal agenda.

On my far left is Mr. Joe Rosette, tribal councilman of the Chippewa Cree Tribe. He is filling in for the chairman, Mr. John Windy Boy, who is not here.

To his right is Darrell Wright, water resource coordinator of the same tribe.

To his right is Daniel C. Boggs, chairman of the Indian Tribal Water Rights Coalition. My fault, sorry—they shifted gears on me. Over here is Mr. Boggs. To the right of Mr. Wright is Hank Meshorer from the Justice Department who you heard earlier today, and to his right is Paul Baird, Associate Solicitor for Indian Affairs, Department of the Interior.

To his right is Jim Bush of Evans, Kitchel and Jenckes, a law firm in Phoenix, and to his right is John Spencer who is listed as a member of METRO. This is just a disguise. His real position is chairman of the Western States Water Council, He was previously deputy director of Washington State department of sociology, now employed by Seattle METRO.

To his right is Roger Jim, chairman of the Yakima Nation.

Moving to my right past Dick Trudell is first Mr. Boggs, and we had identified him. To his far right, Mr. Vincenti Pedro, is that right?

Governor PEDRO. That's right.

Mr. MUYS. Governor of the Pueblo of Laguna, and before we start on possible solutions, I just want to take 1 minute as the moderator's prerogative to say something about the Winters doctrine which we heard a lot about all day, and I am sure will be the focus of discussion on possible solutions.

I will just give you about 2 minutes of what I tell my students. I teach a natural resources course down at the University of Virginia Law School, and we talk about the Winters doctrine, and where we might go with it in the future, where the Supreme Court might go with it. I always think it is important to point out some of the unresolved questions that the Supreme Court left hanging in *Arizona* v. *California* which have not yet been resolved.

No. 1 is that it is by no means clear I think from the way the Court has been going that it will always find an implied water right for every Indian reservation in the West on the same basis that it did in *Arizona* v. *California.*

The Indian water rights issues in *Arizona* v. *California* were not a minor part of that lawsuit, but they were not the principal focus of the battle among the States, and the issues were pretty summarily dealt with by the court. They bought the special master's recommendation, found easily an implied reservation of water for all those reservations.

I think they suggested in some suits generally the *United States* v. *New Mexico* and some others they will probably take a harder look at the issues surrounding the creation of individual Indians and Federal reservations in the future in determining the magnitude and purpose of water rights associated with the reservation.

Second, the court has never decided that if water is impliedly reserved for an agricultural purpose that it necessary or automatically can be used for another purpose on the reservation.

In *Arizona* v. *California* the State parties agreed that the five mainstream tribes could use the water reserved for agricultural purposes, for any purpose on the reservation, Whether that would flow from circumstances of other reservations if disputed by a contending party is essentially up in the air.

The Court also has never had to rule on the question of whether or not the reserved right of an Indian reservation may be used off the reservation. Congress permitted that in the Ocachin legislative settlement, and I think up in Montana and elsewhere the Interior Department is negotiating agreements that would permit the tribes to use their Winters right off the reservation, but the Supreme Court has never been faced with having to decide that issue.

The fourth uncertainty is whether Winters applies to ground water. There are cases that suggest that it probably may, but the Court again hasn't faced that on an Indian reservation.

The final point I mentioned is that the magnitude of the right—we have all been talking about practicably irrigable acreage. We talked this morning about the Court's suggestion that enough water to maintain a moderate lifestyle was an appropriate measure in the *Washington Fishing Vessels* case. In oral argument in *Arizona* v. *California*, at least one member of the Court asked some of the Counsel arguing the case or made the point that just because the Court applied the practicably irrigable acreage test on the five mainstream reservations in *Arizona* v. *California*, it did not mean that that test automatically had to be the measure of the reasonable needs of a reservation in other contexts, so I am just suggesting there seems to be five or six open areas for the Court to take a look at in subsequent cases involving Indian reserved water rights that may come before it, and I guess given the tendency of this Court or any new appointees that might be added to it, it is hard I think to predict with certainty the extent to which everything that was said or implied in *Arizona* v. *California* will still stand the test of time when it gets up before this Court, so it is a guessing game for everyone to play, but I think the full scope of the Winters doctrine is not locked in concrete yet at this point.

Now to get on and talk about possible solutions, and to let some of our panelists catch their airplane, we are going to start with Mr. Roger Jim, chairman of the Yakima Nation, and hear his views on what we might do about all the problems we have already discussed today. Mr. Jim?

STATEMENT OF ROGER R. JIM, SR., CHAIRMAN, YAKIMA INDIAN NATION

Mr. JIM. Thank you, Mr. Muys. My prepared statement thanks Senator Wallop and members of the Senate Energy and Natural Resources Committee.

I would like to thank the other panel here on possibly coming up with proposed solutions as you have on the agenda. I look across the audience. I know many of the people have their own views on solutions which I think this committee is seeking, and I think some of us Indian people, we are going to hear something very strong and hard when I finish my statement.

The need to educate Congressmen and others of the God-given right to water by the Yakima Nation and other Indian people has been a long time coming. It is the lifeblood of the Indian people. Here are my condensed comments.

Each tribe is unique. The decision of each tribe as to how to protect and preserve its people, its land, its resources, its rights, and its treaty will be unique to that tribe. Accordingly, I cannot tell you that there is a single solution to the Indian water rights issue.

I can tell you, however, that of the three most suggested solutions—legislation, negotiation, and litigation—the Indian people oppose Federal legislation that claims to solve and settle the Indian water rights issue. Which of the other two solutions, negotiation or litigation, is the best for a particular tribe is up to that tribe to decide. If Congress wishes to encourage tribes to negotiate, there are several positive actions it can take.

First, Congress can amend the McCarran Act to provide for Federal court jurisdiction of Indian water rights adjudication. If only State courts, which the Indian people see as inevitably favoring non-Indian water users, have jurisdiction to adjudicate Indian water rights, many tribes feel they are at a disadvantage in either litigation or negotiation.

On the other side, non-Indians may insist on litigation in the friendly State courts they feel will be on their side. What is needed is a neutral forum, the Federal district court, to adjudicate water rights where a tribe so chooses or where negotiations have been attempted but failed. It is up to Congress to provide that neutral forum.

Second, the existence of treaty water rights and the Winters doctrine as a body of legal rights and principles superior to Western States prior appropriation doctrine must be recognized and acknowledged by the non-Indian government and water users.

Third, Congress must recognize the conflict of interest which exists in the Department of the Interior, the Secretary of the Interior. The Secretary of the Interior cannot be the trustee and protector of Indian water rights through the Bureau of Indian Affairs while at the same time be the promoter and developer of non-Indian agriculture in the West through the Bureau of Reclamation.

The answer to this conflict is to provide funds to tribes to hire their own independent counsel.

Fourth, and this is of special importance to our Pacific Northwest tribes, as you have heard in the previous panel from Mr. Al Pinkham, with treaty-secured fishing rights Congress can insist that the Federal Energy Regulatory Commission provide sufficient stream flows to protect our salmon and steelhead fisheries when it licenses and regulates hydro projects. There are many other things Congress can do to help solve the many problems faced by Indian tribes in protecting and preserving their water rights. These are just some suggestions.

However, if Congress does these things, I predict the members of this committee will see much progress in resolving Indian water rights issues across the country.

In closing, I would like to invite the committees of Congress to come to the Yakima Valley to have a hearing right there where the action is to better understand what is happening to the Yakima Indian Nation in respect to the *La Plate* case and to the other proposed projects that Congress has enacted as a law, to study, and it seems the Bureau of Reclamation is coming to the reservation and telling us about alternatives rather than being positive in the studies that relate to the three projects on the reservation.

The water starts on the reservation and ends on the reservation, and then they want us to share with our downstream neighbors.

I think our tribe had to come to Congress and go to court and stop the usage of this water in the proposed project, and I hope that this committee and other committees of Congress, especially the new permanent committee, will take time to think of coming to the Yakima Valley and be able to see the attempts to steal Indian water.

I think a resolution will be presented here by Mr. Boggs, and I want to leave my feeling as the chairman of the Yakima Nation that I support that resolution.

I thank you.

[The prepared statement of Mr. Jim follows:]

ESTABLISHED BY THE
TREATY OF JUNE 9, 1855
CENTENNIAL JUNE 9, 1955

CONFEDERATED TRIBES AND BANDS
Yakima Indian Nation

POST OFFICE BOX 151
TOPPENISH WASHINGTON 98948

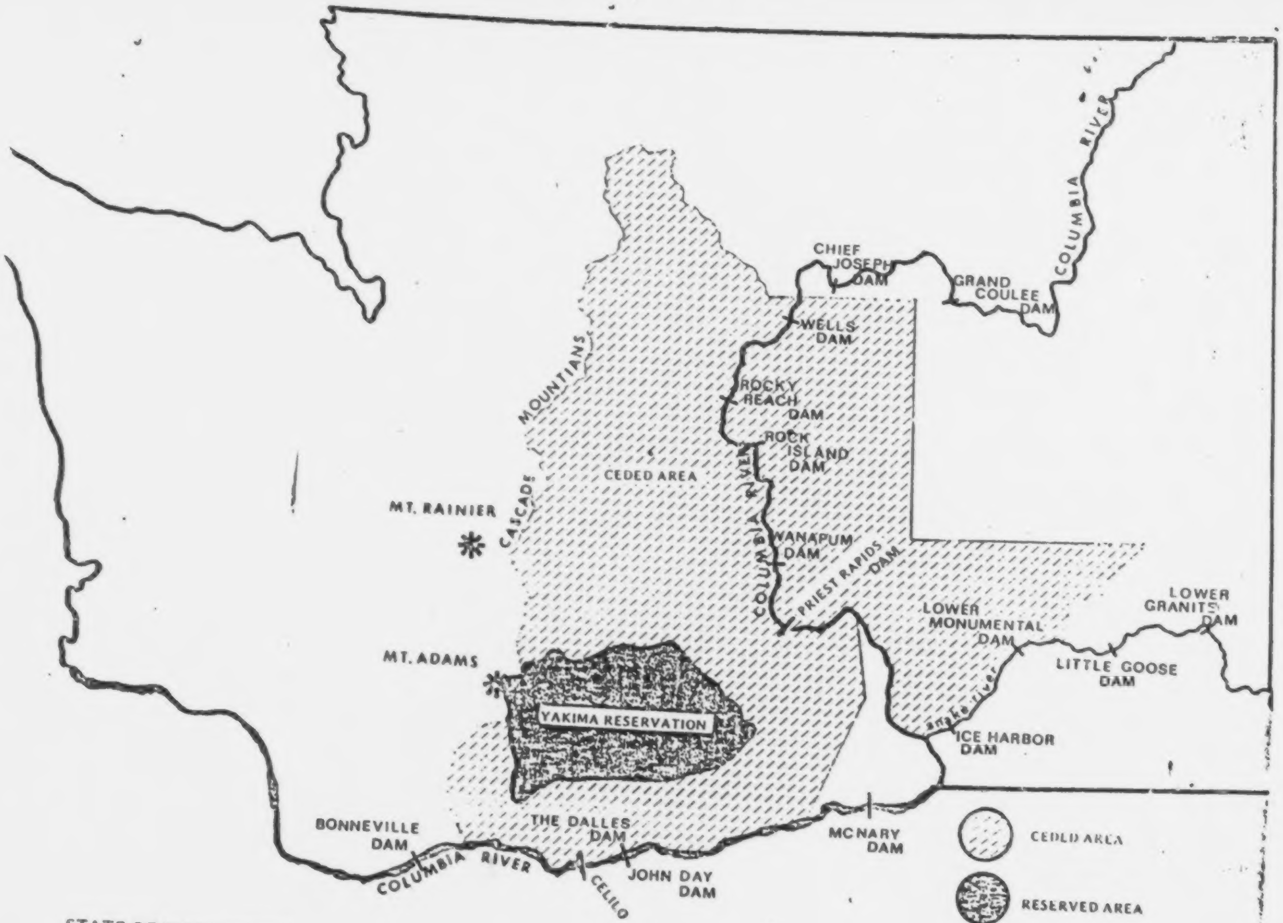
GENERAL COUNCIL
TRIBAL COUNCIL

STATEMENT OF ROGER R. JIM, SR., CHAIRMAN
YAKIMA INDIAN NATION

Thank you, Senator Wollop and members of the Senate Energy and Natural Resources Committee for providing this forum on Indian Water Rights. The need to educate congressmen and others of the God given right to water by the Yakima Nation and other Indian people has been a long time coming. It is the life blood of the Indian people. Here is my condensed comments. Each tribe is unique. The decision of each tribe as to how to protect and preserve its people, its land, its resources, its right and its treaty will be unique to that tribe. Accordingly, I cannot tell you that there is a single solution to the Indian water rights issue. I can tell you, however, that of the three most often suggested solutions - legislation, negotiation and litigation - the Indian people oppose federal legislation that claims to solve and settle the Indian water rights issue. Which of the other two solutions negotiation or litigation - is the best for a particular tribe is up to that tribe to decide. If Congress wishes to encourage tribes to negotiate, however, there are several positive actions it can take. First, Congress can amend the McCarran Act to provide for federal court jurisdiction of Indian water rights adjudication.

If only state courts, which the Indian people see as inevitably favoring non-Indian water users, have jursidiction to adjudicate Indian water rights, many tribes will feel they are at a disadvantage in either litigation or negotiation. On the other side, non-Indians may insist on litigation in the friendly state courts they feel will be on their side. What is needed is a neutral forum, the federal district court, to adjudicate water rights where a tribe so chooses or where negotiations have been attempted but failed. It is up to Congress to provide that neutral forum. Second, the existance of Treaty water rights and the Winters Doctrine as a body of legal rights and principles superior to the western states' prior appropriation doctine must be recognized and acknowledged by the non-Indian governments and water users.
Third, Congress must recognize the conflict of interest which exists in the Department of Interior, the Secretary of the Interior. The Secretary of Interior cannot be the trustee and protector of Indian water rights through the Bureau of Indian Affairs, while at the same time be the promoter and developer of non-Indian agriculture in the west through the Bureau of Reclamation. The answer to this conflict is to provide funds to tribes to hire their own independent counsel. Forth, and this is of special importance to our Pacific Northwest tribes with treaty-secured fishing rights, Congress can insist that the Federal Energy Regulatory Commission provide sufficient stream flows to protect our

salmon and steelhead fisheries when it licenses and regulates hydro projects. There are many other things Congress can do to help solve the many problems faced by Indian Tribes in protecting and preserving their water rights. These are just some suggestions. However, if Congress does these things, I predict the members of this committee will see much progress in resolving Indian water rights issues across the country.


COLUMBIA RIVER
CHIEF JOSEPH DAM
GRAND COULEE DAM
WELLS DAM
ROCKY REACH DAM
ROCK ISLAND DAM
CASCADE MOUNTIANS
CEDED AREA
MT. RAINIER
COLUMBIA RIVER
WANAPUM DAM
PRIEST RAPIDS DAM
LOWER MONUMENTAL DAM
LOWER GRANITS DAM
LITTLE GOOSE DAM
Snake River
ICE HARBOR DAM
MT. ADAMS
YAKIMA RESERVATION
BONNEVILLE DAM
THE DALLES DAM
COLUMBIA RIVER
CELILO
JOHN DAY DAM
MCNARY DAM
CEDED AREA
RESERVED AREA

STATE OF WASHINGTON

Mr. MUYS. Thank you, Chairman Jim. Let's move to Mr. Boggs, Chairman Boggs, Indian Tribal Water Rights Coalition.

STATEMENT OF DANIEL C. BOGGS, CHAIRMAN, INDIAN TRIBAL WATER RIGHTS COALITION

Mr. BOGGS. Thank you, Mr. Chairman and panel, and the audience, and everyone concerned with water rights. We have a longer statement here, but we will sort of summarize the statement from the Indian Tribal Water Rights Coalition of which I am the president to the Senator Malcolm Wallop, the chairman of the Senate Energy and Natural Resources Committee, the Subcommittee on Public Lands and Water.

There is attached a copy of a statement to Senator Wallop in which the Indian Tribal Water Rights Coalition reviews in specific detail the gross impropriety of Secretary William P. Clark writing to Governor Schwinden of Montana outlining the desire of the Reagan administration to resolve the historic conflict respecting Indian Winters reserved rights to the use of water between Indian tribes in the Western States.

Paragraph 1 there I stress that unless and until there is resolved the conflict that exists between Indian tribes and Secretary Clark, it is an impossible endeavor to negotiate with States or anyone else.

Paragraph 2, negotiations between the Indian tribes and the States so vigorously sponsored by Secretary Clark is a subterfuge pursuant to which the attempted confiscation of Indian rights by successive Secretaries of the Interior including Secretary William P. Clark can be masked and shrouded behind State-Indian negotiations.

Three, I know of no Indian reservation on any major western stream where the Secretary of the Interior has not violated Indian rights. Unless and until the controversies existing between the Indians and the Secretary of the Interior have been satisfactorily disposed of, it is the height of foolishness for Secretary Clark or anyone else discussing negotiations.

Obviously, it is the purpose of Secretary Clark to negotiate Indian rights on the basis of those rights having been extensively violated by Secretaries of the Interior, and any settlement would be in contemplation of those violations, leaving the internal mismanagement by the Secretary of the Interior of Indian rights unresolved.

Paragraph 4, it is the position of Secretary Clark and Attorney General Smith that the States have power and authority to administer rights to the use of water on Indian reservations.

There are two aspects involved. One, Secretary Clark would denigrate Indian reserved rights to the use of water, and two, Secretary Clark would strike down Indian sovereign power to administer their resources.

Paragraph 5, sensible negotiations between the Indian tribes and Secretary Clark should be forthwith initiated. In that manner, the irreparable and ongoing damage experienced by Indian tribes by successive Secretaries of the Interior, including Secretary Clark, could be resolved. Ignored by Secretary Clark is the fact that not only have successive Secretaries of the Interior seized and utilized Indian water rights for non-Indian purposes, those Secretaries of the Interior, including Secretary Clark, have in the past and are now suppressing Indian water rights development and use for the benefit of the non-Indian constituents of Secretary Clark.

Paragraph 6, in the accompanying statement it is demanded that Secretary Clark cease and desist from perverting the meaning of the *Winters* decision and of denigrating and limiting Indian Winters rights by imposing unrealistic criteria respecting economic feasibility.

No. 7, it is equally clear that it must be recognized by Secretary Clark that the Indians are the owners of their rights to the use of water, that those rights while not Federal in character, that the Indian rights are adequate to meet the present and future requirements of the Indians, and that Indian rights may be exercised for any purpose.

No. 8, additionally, Secretary Clark must insist that his lawyer, Attorney General William French Smith, either totally refrain from forcing the representation of the Department of Justice upon the Indian tribes in water litigation, or that Attorney General Smith adhere to the principles that support Indians so as not to violate Indian rights for the benefit of non-Indians.

No. 9, further, Secretary Clark, should demand that William French Smith instruct the Department of Justice to support the Colville Confederated Tribes, and not non-Indian Walton in the case of *Colville* v. *Walton.* If Secretary Clark does not support the Indians in the case of *Colville* v. *Walton* and in other pending Indian cases, the charges that I make against Secretary Clark as terminationist will not need further documentation.

Broad generalizations by Secretary Clark must be rejected. On each reservation there are serious specific problems requiring specific resolution. Those specific problems demand immediate attention by Secretary Clark and not the subterfuges of tribal-State negotiations.

Unless and until Secretary Clark is willing to proceed in regard to those well known and well-defined conflicts, he is wasting his breath speaking of negotiated settlements. The gravest threat to the Indian people today is William P. Clark, not the States.

I have a resolution from the Indian Tribal Water Rights Coalition demanding Interior Secretary Clark fulfill his trust obligation to Indian tribes:

> Whereas: Secretary of the Interior, William P. Clark, is the principal violator of Indian water rights for the benefit of Federal reclamation projects and other non-Indian projects administered by Secretary Clark; and
>
> Whereas: Secretary William P. Clark is seeking to avoid responsibilities for his on-going violations of Indian water rights by seeking to have Indians negotiate with the states who are not involved in these violations and thereby avoiding Secretarial responsibilities;
>
> Whereas: The Indian tribes insist that before there are discussions respecting negotiations or litigations, Federal or state, the Secretary of the Interior must resolve these all-pervasive conflicts with the Indian tribes stemming from Secretary Clark's administration of Federal reclamation and other non-Indian projects; and
>
> Whereas: The states, under the law as it presently exists, neither have jurisdiction to adjudicate Indian water rights nor to administer those water rights; and
>
> Whereas: William P. Clark and his lawyers, including the Department of Justice, are aggressively perverting the McCarran Amendment, 43 USC 666, and the law of

the states themselves in an effort to subvert Indian tribes and their water rights to state court jurisdiction as a device to cloak and cover up Secretary Clark's violations of Indian water rights; and

Now therefore be it resolved: That the Secretary of the Interior be forced first to resolve his conflicts with Indian tribes which conflicts are endemic throughout Western United States before there can be any discussions of negotiations between Indian tribes and the states assuming that states had any water rights with which to negotiate which is denied by the tribes; and

Be it further resolved: That Indian tribes reject out of hand any assertion that the states have power, authority, or jurisdiction to adjudicate or to administer Indian water rights;

Be it further resolved: That Secretary Clark as principal agent of the United States trustee for the tribes take immediate action to preclude the Department of Justice as attorney for Secretary Clark from forcing that agency's representation upon Indian tribes in water litigation due to the all-encompassing conflicts of interest which immerse the Department of Justice and which preclude that agency from properly representing Indian tribes in water litigation. Those conflicts of interest as they prevail today have no relationship to the unusual factual situation in the recent Supreme Court decisions in the Nevada case and Arizona versus California, which cases are not precedents for the on-going or future litigation involving Indian water rights. The Nevada and Arizona decisions relate to decrees giving rise to long vested adjudicated rights of numerous non-Indian claimants; and

Be it further resolved: That Indian tribes reject totally the assertion that the Adsit and San Carlos decision is precedent for state court jurisdiction either to adjudicate or to administer Indian reserved rights to the use of water and the tribes hereby demand that Secretary William P. Clark refrain from further asserting that San Carlos and Adsit cases confer jurisdiction upon state courts in regard to Indian water rights.

This resolution was attested by Secretary Geraldine Gordon and myself.

We might add that the Blackfeet Tribe have not always been opposed to negotiation. The Blackfeet Tribe Reservation at one time covered all of Montana east of the Continental Divide, and a large part of the province of Alberta and now into what is known as Wyoming and Idaho—their hunting ground.

We negotiated several times, and each time we did, we were squeezed into a smaller corner. Now we are up against the rocks, right up against the mountains. We are also against the Canadian border, with no place else to go, and they have found that we have still got something pretty danged valuable—water, and now they want to negotiate again.

I don't think we can afford it. We couldn't afford to the other time. For dang sure we can't afford to now.

Thank you.

Mr. Muys. Thank you, Mr. Boggs. Let's hear from Governor Pedro of the Pueblo of Laguna.

[The prepared statement of Mr. Boggs follows:]

STATEMENT
TO
SENATOR MALCOLM WALLOP, CHAIRMAN
SENATE ENERGY AND NATURAL RESOURCES COMMITTEE
SUB COMMITTEE ON PUBLIC LANDS AND WATER
FROM
INDIAN TRIBAL WATER RIGHTS COALITION
DANIEL C. BOGGS, PRESIDENT

INDIAN RESERVED WATER RIGHTS WORKSHOP
JUNE 19, 1984

There has been received by each of Montana's Indian Tribes, a letter dated June 4, 1984, from Secretary of the Interior, William P. Clark. That letter was addressed to Montana's Governor Schwinden purporting to outline the policy of President Reagan on the subject of Indian Reserved water rights. Secretary Clark declares that President Reagan endorses the concept of settling Indian water rights with the states through negotiations. Two conditions are imposed:

1. Federal officials must participate in the negotiation process;
2. Cost sharing between the Tribes, the states and the federal government must be included in the settlement negotiations.

Explicit in Secretary Clark's letter are aspects necessarily repugnant to Indian Tribes. Primarily, Secretary Clark intends to subvert Indian Tribes and their Reserved rights to state control. In one stroke, Secretary Clark would effectively confiscate for his own benefit substantial quantities of Indian Reserved rights and simultaneously denigrate the inherent sovereign power of the Tribes to manage, control and allocate the water supplies on the Reservations predicated upon the Tribes inherent power to control their natural resources.

As to the charge that Secretary Clark seeks to confiscate Indian rights by his proposal to negotiate, on my own Reservation, Secretary Clark is today seizing, diverting and delivering Blackfeet water to non-Indian federal reclamation projects administered by him. There is no possible way that the Blackfeet Indian Nation can negotiate with the State of Montana unless and until the conflict that the Blackfeet Indian Nation has with Secretary Clark is resolved. By entering into negotiations with the State of Montana antecedent to resolving the conflicts between my Tribe and Secretary Clark would constitute a most convenient cloak which would shroud the seizure by Secretary Clark of the entire flow of the St. Mary and Milk Rivers on our Reservation.

Secretary Clark's letter is a clever scheme. Secretaries of the Interior have historically robbed the Indian Tribes of their land, their timber and their water with the same kind of trickery that Secretary Clark sets out in his June 4th letter. To those Indians who think that Secretary Clark's offer is not in bad faith, stop and think of the facts as they prevail. Secretary Clark is today named a defendant in the case of Blackfeet Indian Nation v. Secretary Clark, et. al. In that litigation, the Blackfeet Indian Nation seeks to force an accounting for Secretary Clark's day to day seizure and diversion of the waters of the St. Mary and Milk Rivers away from the Blackfeet Indian Reservation for use on the Milk River Federal Reclamation Project. For Secretary Clark to ignore the case of Blackfeet Indian Nation v. Secretary Clark and to settle the litigation with the State of Montana, is an easy but a totally immoral course of conduct. That course of conduct has been adhered to by successive Secretaries of the Interior in vastly diminishing our Reservation in clear violation of our Treaty with the United States in 1855.

I am necessarily interested in the references of Secretary Clark to the negotiations between the Fort Peck Tribes and the State of Montana. It will be remembered that in those negotiations there was no reference to the Milk River in which the Fort Peck Tribes hold Winters Doctrine rights. The reason for that failure is obvious - to cover up the fact that the rights of the Fort Peck Tribes in the Milk River would be totally ignored and the Fort Peck Tribes would be deprived of those rights through the process of negotiation with the State of Montana as urged by Secretary Clark.

I have no intention of encroaching upon the negotiations between the Fort Peck Tribes and the State of Montana. What I say to both the State of Montana and the Fort Peck Tribes is that the Milk River arises upon my Reservation and the water that flows down to the Fort Peck Tribes largely comes from my Reservation. I am convinced that Secretary Clark would like to use the precedent of the Fort Peck Tribes abandoning their claims to the Milk River and apply that precedent to my Tribe and to the Fort Belknap Tribe. May I likewise refer to a fact in regard to the Milk River and the Fort Belknap Tribe that every Indian must consider. The Winters Doctrine was first applied to the Milk River on the Fort Belknap Indian Reservation. The same year, that Doctrine was applied by the Court of Appeals for the Ninth Circuit to Birch Creek on my Reservation. Yet Secretary Clark on both Reservations is today systematically violating the Winters Doctrine rights on both the Blackfeet Indian Reservation and the Fort Belknap Indian Reservation. Indeed, in litigation initiated by the Department of Justice, the Fort Belknap rights in the Milk River were outrageously abandoned by the Department of Justice as was done by the Department of Justice in regard to my own Reservation.

Simply stated, a primary objective of Secretary Clark's letter is to "gut" the Winters Doctrine. By the trickery in Secretary Clark's letter relative to the destruction of the Winters Doctrine, it is essential that all Tribes in the United States unite at this time and confront Secretary Clark with the gross immoral and illegal course of conduct that he is so aggressively sponsoring in his letter to Governor Ted Schwinden.

My I turn to another aspect of Secretary Clark's planned violation of Indian Winters Doctrine rights - that is to be accomplished through Attorney General William French Smith by forcing rejected and unwanted representation upon the Tribes through the Department of Justice. Attorney General Smith, on behalf of Secretary Clark, will effectively denigrate any Indian Winters Doctrine rights that are taken into court by the Department of Justice. The magnitude of the culpability of Attorney General Smith's Department of Justice is well demonstrated by this studied attack upon the Winters Doctrine. At issue in the case of Colville v. Walton is the claim of non-Indian Walton that he acquired an Indian Winters right adequate to meet non-Indian Walton's present and future claims. Simply stated, it is asserted in the Walton case by non-Indian Walton that, having purchased a tract of Indian land, he can take unlimited water from the stream to the destruction of downstream

Indian rights. For fifteen years, the Colville Confederated Tribes has vigorously fought to constrict the non-Indian claims to an expanding water right. That issue in on appeal before the Court of Appeals for the Ninth Circuit. On the day when the Department of Justice was to file its brief in support of the Colville Confederated Tribes, this announcement was made; the Department of Justice would support non-Indian Walton and his claimed expanding water right destructive of Indian rights. That destruction of Indian rights, the Department of Justice announced, would be fully supported by the Department of Justice and the Department of Justice would file a brief in opposition to the Colville Confederated Tribe and in support of non-Indian Walton.

Secretary Clark's letter to Governor Schwinden is written on the background of Attorney General Smith's illegal, immoral and duplicitious assertion that the Reagan Administration not only supports state control but fully supports non-Indian Walton who represents the whiteman's greed for Indian water rights is so totally destructive to Indians' present development and which totally bars any possibility of future development of their water rights.

It can only be assumed that in negotiations so strongly sponsored by Secretary Clark that the federal negotiators will proceed on the basis of the assertion of Secretary Clark that the non-Indian on the Reservations will hold an expanding water right and that the expanding water right can destroy Indian users as asserted by William French Smith on behalf of Secretary Clark.

Secretary Clark is likewise financing litigation being conducted by the Department of Justice "on behalf" of Indian Tribes. That financing entials employment of "experts" who attack the Winters Doctrine by declaring that the Winters Doctrine applies only to lands, the irrigation of which, are economically feasible. Otherwise stated, Secretary Clark's hired "experts" will point out that otherwise irrigable acres are too far from the market and that the produce from those irrigable acres cannot be sold at a profit. Therefore, says Secretary Clark, those lands are not entitled to Winters Doctrine rights.

I know this policy being followed by Secretary Clark from personal experience. On my Reservation, the Bureau of Indian Affairs (BIA)-- it works for the Secretary of the Interior and not for Indians---- hired "experts" pursuant to a contract which established criteria for irrigable acreage that would have reduced my Tribe's irrigable acreage by a minimum of 75%. Secretary Clark, by adhering to the course of conduct which I have outlined, can justifiy his confiscation of the St. Mary and Milk Rivers on my Reservation on the grounds that *none* of the lands on our Reservation which could be irrigated from the St. Mary and Milk River, are irrigable.

One of the most threatening aspects to the Indian Reserved rights is the course of conduct being pursued by Secretary Clark's Department. It is asserting that Indian rights are federal rights. This is not new. But it is being underscored by the Secretary of the Interior and the Department of Justice in their claims to water rights. They are asserting that the rights belong to the Federal Government and *not* to the Indians, that as "Trustee", the United States will make the decisions as to whether to negotiate or to litigate. As can be seen in the letter from Secretary Clark to Governor Schwinden, there is no reference to the independence of the Indian Tribes in their dealings with the states. It is the federal government taking the initiative with the State of Montana and when Secretary Clark refers to "concurrence" of the Indian Tribes, it partakes of an afterthought. Most assuredly, he does not say, as he should, that the Indians hold a veto over any settlement. For the reasons expressed above, Secretary Clark has a committment to protect the rights and interests of the whiteman as has been done in the Walton case. Once again it is obvious that Secretary Clark is not the Trustee for the Indian Tribes; he is Trustee for the whiteman. It is his purpose to bleed away the vitality of the *Winters Doctrine* as enunciated by the Supreme Court. Basically, the Supreme Court declared that in exchange for reducing their once vast domains, the Indians would be assured of a permanent home and abiding place with adequate water to meet their present and future requirements measured by irrigable acres. What Secretary Clark is saying is that the Indian rights are federal rights to be constricted by economica criteria that would totally nullify the principles of the Winters Doctrine as enunciated by the Supreme Court.

By forcing us into state negotiations or into the state courts, it is too clear for serious question that what ever remnant remains of the Winters Doctrine, in the mind of Secretary Clark, he is counting on the states to destroy those concepts in the state courts and tribunals. It is represented by Secretary Clark and Attorney General Smith that the San Carlos and Adsit Cases declared that the state courts have jurisdiction over our Indian rights. That is a fraud and a sham. The only thing determined in the San Carlos-Adsit Decision is that the Disclaimer Clause in the Enabling Act in the Constitution of the states was not a barrier to the application of the McCarran Amendment if that Amendment was otherwise applicable. It must be bourne in mind that the Supreme Court itself in Adsit and in San Carlos specifically declared that it was not----I repeat----the Supreme Court was not deciding that the water laws of Montana or Arizona came within the purview of the McCarran Amendment, that the Montana or Arizona laws would be adequate to adjudicate and determine the highly critical issues respecting Indian water rights that remain undetermined.

I cannot urge too strongly that the American Indians at the Workshops on June 19th force admission from the sponsors of those orkshops, the limited character of the San Carlos and Adsit Decision and to deny that the state courts have jurisdiction unless there is proof that the state laws conform with the McCarran Amendment which is limited strictly to "general adjudication" which can only determine priorities and quantities of water---nothing else.

Finally, the states themselves have joined Secretary Clark in the attack on Indian water rights. Contrary to fact, law and history, the states are saying that title to water rights are derived from states. That is grossly inaccurate and contrary to all legal principles. It nevertheless dovetails nicely with the well orchestrated attacks being conducted by Secretary Clark against the American Indian. By declaring that the states are sources of title to water rights, it is possible to lend some legitimacy to the assertions that the Tribes should negotiate with the states. That is another part of the trickery in which Secretary Clark is engaging. Secretary Clark knows very well that states do not own rights to the use of water, therefore they have nothing to neogtiate. As a consequence, whatever sham negotiations are concluded with the states, there can be no validity to the negotiations, 1) without the approval of the Tribes; 2) without Congressional enactments. Secretary Clark did not mention those factors in his letter to Governor Schwinden clearly outlining his intention to confer upon state negotiations a legitmacy that does not exist. It is of interest that Attorney General Smith, addressing an assembly in the State of Wyoming, spoke extensively about federal-state water rights but did not have the integrity to discuss the fact that title to all rights to the use of water was necessarily derived from the United States of America and where Indian rights are involved, it is the Indian Tribes who hold the prior and paramount rights and interests.

In closing, I wish to refer to the fact that Secretary Clark willingly stepped down from the high position of principal advisor of President Reagan to the inferior posture of Secretary of the Interior. That can be understood only if Washington politics are well understood. Jim Watt had blundered his usefulness away and Reagan needed an astute character, typical of Secretary Clark, to wrest from the Indian Tribes their lands, their water, their timber. Someone was needed to subvert and denigrate the inherent sovereign power of the Tribes and to subject them to state control. Secretary Clark, as the Chief Justice of the Supreme Court of the State of California, was obviously the man to undertake the utterly immoral task. Secretary Clark could lend dignity to termination of the Indian Tribes and people without even utilizing the word or admitting out loud his objective. Yet termination is the policy of President Reagan to be effectuated quietly by Secretary Clark, his long trusted companion, who can be relied upon by President Reagan effectively to carry out the designed policy of termination which underlies President Reagan's concept respecting Indian Nations, Tribes and people.

Rest assured, the Wallop Workshop is a long step in softening up the Indians to termination.

THE SECRETARY OF THE INTERIOR
WASHINGTON

cc: Water
Depart

JUN 4 1984

Honorable Ted Schwinden
Governor of Montana
Helena, Montana 59620

Dear Governor Schwinden:

In the time since assuming my responsibilities as Secretary, I have had presented to me a number of issues regarding water resources in the western United States. Prominent among them is the quantification of Indian and other Federal reserved water rights in the State of Montana.

Early in this century, the Supreme Court established the doctrine of reserved water rights in a case involving Indians of the Fort Belknap Reservation and other citizens of Montana who used water from the Milk River. In the intervening decades the conflict over water rights has widened, enveloping numerous other Indian and non-Indian interests on every other major water source in the State.

In view of the essential role that water plays in the economy of Montana, I am persuaded that the United States, with the concurrence of the Indian tribes in the State, should work with the State to quantify the Federal Government's claims to water. Such a cooperative spirit could lead to a fair settlement of the serious conflicts over water rights that have persisted between State and Federal claimants.

Legislation enacted by the State in 1979 provides for quantification of Federal reserved water rights by litigation in the State water courts or through the negotiation of compacts. The decision of the Montana legislature to establish formal procedures for negotiated settlement of Federal reserved water rights provides a valuable alternative to the costly, burdensome and frequently ill-suited processes of litigation. This is especially so where Indian reserved rights are concerned. The Montana tribes have notified the State of their interest in negotiating their claims to water. They, like many non-Indian water users, view the settlement process as an opportunity to achieve goals that cannot be obtained in litigation.

President Reagan, in endorsing the concept of water rights settlements, has established two conditions for their approval by this Administration. First, he requires that Federal Officials participate in the negotiation process. Without that participation, meaningful judgments cannot be made about the costs and benefits of a settlement or its implications for other water rights settlements in the west. Second, he requires that provisions for cost sharing among settlement beneficiaries be included in negotiated agreements. Accordingly, we will not insist on a uniform sharing formula in settlement negotiations.

My staff advised me of the results of the Department's participation in negotiations with Montana's Reserved Water Rights Compact Commission. The settlement which appears to have made the most progress is that involving the Fort Peck Reservation. For several months in 1982 and early 1983 representatives of the Fort Peck Tribes, this Department, the Department of Energy and the Corps of Engineers worked closely with the Compact Commission to negotiate a settlement of the Tribe's water rights. As you know, the negotiations were terminated by the Compact Commission in early 1983. At that time, the Commission and the heads of other State executive agencies who had been consulted throughout the negotiation process had withdrawn their agreement to understandings that had been reached during negotiations. By letter of January 18, 1984, the newly appointed negotiator for the Compact Commission, Urban L. Roth, invited representatives of this Department who had participated in the earlier negotiations to consider a proposed compact for a Fort Peck settlement that had been prepared at his direction but without participation by the Fort Peck Tribes or this Department.

The opportunity to resume negotiations warrants serious consideration. If the Fort Peck Tribes were to agree to participate in renewed negotiations we would as well, once we had an understanding with you on the conduct of the negotiations. Specifically, we recommend that the State, the Fort Peck Tribes and the Department agree that each of the parties appoint negotiators who are authorized to make commitments on behalf of the executive branch of their respective governments. The State cannot fairly ask this Department, other Federal agencies and the Fort Peck Tribes to bear the substantial costs associated with renewed negotiations unless the Compact Commission is authorized to speak for the executive branch of the State government during the negotiations. We understand that a compact eventually will have to be approved by the State legislature, the tribal council and the Congress. Obviously those legislative bodies have to exercise their independent judgment in approving a negotiated settlement. Nonetheless, in our view, concurrence of the executive authorities is essential to successful negotiations.

Because of the importance of negotiating authority to successful settlements, I will await your views on that issue before directing representatives of this Department to resume negotiations with the Compact Commission.

I also understand that Montana's statute authorizing negotiations requires that compacts be negotiated by July 1, 1985. Given the prolonged process of compact negotiation, it might be appropriate to request that the Montana legislature extend that deadline. Otherwise, the burden of litigation preparation to which we would be required to submit under the Montana adjudication statute would make it virtually impossible for us to negotiate effectively.

I look forward to working with you and the Indian Tribes of Montana to reach a mutually satisfactory water rights quantification in your State.

Sincerely,

William Clark

cc: Honorable Max Baucus
Honorable John Melcher
Honorable Ron Marlenee
Honorable Pat Williams
Earl Old Person, Chairman, Blackfeet Tribe
Donald Stewart, Chairman, Crow Tribe
Joseph J. Felsman, Chairman, Confederated Salish & Kootenai Tribes of the Flathead Reservation
John Windy Boy, Chairman, Chippewa and Cree Tribes of the Rocky Boy's Reservation
Franklin R. Perez, Chairman, Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation
Norman Hollow, Chairman, Assiniboine & Sioux Tribes of the Fort Peck Reservation
Allen Rowland, Chairman, Northern Cheyenne Tribe
Richard LaFromboise, Chairman, Turtle Mountain Band of Chippewa of the Turtle Mountain Reservation

INDIAN TRIBAL WATER RIGHTS COALITION

NO. 4-84

RESOLUTION DEMANDING INTERIOR SECRETARY CLARK FULFILL HIS TRUST OBLIGATION TO INDIAN TRIBES

WHEREAS: Secretary of the Interior, William P. Clark, is the principal violator of Indian water rights for the benefit of federal reclamation projects and other non-Indian projects administered by Secretary Clark; and

WHEREAS: Secretary William P. Clark is seeking to avoid responsibilities for his ongoing violations of Indian water rights by seeking to have Indians negotiate with the States who are not involved in those violations and thereby avoiding Secretarial responsibilities;

WHEREAS: The Indian Tribes insist that before there are discussions respecting negotiations or litigations, Federal or State, the Secretary of the Interior must resolve his all-pervasive conflicts with the Indian Tribes stemming from Secretary Clark's administration of federal reclamation and other non-Indian projects; and

WHEREAS: The States, under the law as it presently exists, neither have jurisdiction to adjudicate Indian water rights nor to administer those water rights; and

WHEREAS: William P. Clark and his lawyers including the Department of Justice are aggressively perverting the McCarran Amendment, 43 USC 666, and the law of the States themselves in an effort to subvert Indian Tribes and their water rights to State Court jurisdiction as a device to cloak and cover up Secretary Clark's violations of Indian water rights; and

NOW THEREFORE BE IT RESOLVED: That the Secretary of the Interior be forced first to resolve his conflicts with Indian Tribes, which conflicts are endemic throughout Western United States, before there can be any discussions of negotiations between Indian Tribes and the States assuming that States had any water rights with which to negotiate which is denied by the Tribes; and

BE IT FURTHER RESOLVED: That Indian Tribes reject out of hand any assertion that the States have power, authority or jurisdiction to adjudicate or to administer Indian water rights;

BE IT FURTHER RESOLVED: That Secretary Clark, as principal agent of the United States Trustee for the Tribes take immediate action to preclude the Department of Justice as Attorney for Secretary Clark from forcing that Agency's representation upon Indian Tribes in water litigation due to the all-encompassing conflicts of interest which immerse the Department of Justice and which preclude that Agency from properly representing Indian Tribes in water litigation. Those conflicts of interest, as they prevail today, have no relationship to the unusual factual situation in the recent Supreme Court decisions in the Nevada Case and Arizona v. California, which cases are not precedents for the on-going or future litigation invloving Indian water rights. The Nevada and Arizona decisions relate to decrees giving rise to long vested adjudicated rights of numerous non-Indian claimants; and

BE IT FURTHER RESOLVED: That Indian Tribes reject totally the assertion that the Adsit and San Carlos decision is precedent for State court jurisdiction either to adjudicate or to administer Indian Reserved rights to the use of water and the Tribes hereby demand that Secretary William P. Clark refrain from further asserting that the San Carlos and Adsit cases confer jurisdiction upon State courts in regard to Indian water rights.

ATTEST:

INDIAN TRIBAL WATER RIGHTS COALITION

Geraldine Gordon
Geraldine Gordon, Secretary

Daniel C. Boggs
Daniel C. Boggs, President

CERTIFICATION

I hereby certify that the foregoing resolution was adopted by the Indian Tribal Water Rights Coalition in a duly, called, noticed and convened session assembled on the 18th day of June, 1984 at Washington, D.C. with a quorum of Tribes present.

Geraldine Gordon
Geraldine Gordon, Secretary

STATEMENT OF VINCENTI PEDRO, SR., GOVERNOR, PUEBLO OF LAGUNA

Governor **Pedro**. Thank you, Mr. Chairman, other distinguished participants. My name is Vincenti Pedro, Senior. I am the Governor of the Pueblo of Laguna of New Mexico. I greatly appreciate this opportunity to present information concerning an issue of great significance to the Lagunas; namely, our federally guaranteed water rights.

I am here today to respectfully urge to the Congress and other participants that the resolution of often unavoidable conflicts over Indian water rights in the Southwest and elsewhere depends upon a recognition of several factors which I would like to summarize briefly now.

Each tribe is unique in its history and present circumstances as they relate to tribal water rights. Resolution of tribal water claims, therefore, must be accomplished on a strictly tribal-specific basis. Sweeping national solutions, legislative or otherwise, are not appropriate and are certain to infringe upon particular tribes' legal rights to water.

Before tribes can be expected to discuss in any forum issues concerning their water claims, they must have funds with which to inventory their water and arable land resources and collect related information.

Tribes also should receive funds from their trustee, the Federal Government, to establish governmental institutions to regulate effectively water quality on reservations since Federal environmental laws authorize Federal moneys for States, but not for the tribes. A welcome and important first step in this area would be the lifting of the Interior Department's moratorium on the approval of Indian water codes.

A major financial commitment by Federal and State governments as well as by industry to the discovery and delivery of water to supplement existing over-appropriated sources should be coupled with a regional policy of water conservation and to avoid the wasting of the less expensive water sources.

Let me now turn for the next few moments to a discussion of my own reservation, the Pueblo of Laguna, to provide a specific context for the observations I have just made.

The Pueblo of Laguna today has been placed through no fault of its own in a position with regard to its water. Virtually every drop of water used by Lagunas since at least the 16th century has been diverted by upstream users.

Historically our people survived in an extremely arid region through the irrigation of approximately 3,000 acres utilizing some 10,000-acre-feet per year from the Rio San Jose River's virgin flow of 26,000-acre-feet per year. This past year, no more than 150 acre-feet were available from the Rio San Jose to irrigate 50 acres, and no other surface water sources were available. Therefore, to protect the very key of our survival, in 1982 the United States filed a water trespass claim in Federal court, requesting substantial damages and prospective protective orders.

The suit was dismissed in light of an ongoing State court stream adjudication. Our water right is based on ownership of land and an accompanying water use dating back, as I mentioned above, to the 16th century. These aboriginal uses have been recognized under the Spanish, Mexican, and United States law in the Treaty of Guadalupe Hidalgo. We believe that these rights were confirmed in the Treaty of Guadalupe Hidalgo and are contemplated by the Winters doctrine.

We note, however, that the issue of the source of Pueblo water rights is in litigation in the tenth circuit in *New Mexico* v. *Aamodt.*

These judicial actions, unfortunately, consume vast amounts of time, energy, good will, and monetary resources, and in an ultimate sense do not even solve the real dilemma facing both Indians and non-Indians. That is a lack of sufficient water.

Instead, the litigation promotes contention, making enemies of friends and potential friends, and of course frequently pitting Indian against non-Indian. We have no choice, however, but to use any effective means available to us to protect our long-standing and vital right to water.

A first step in this regard understandably is litigation, but unless new water sources are developed, existing and largely non-Indian users may find their rights diminished so that we at last may utilize our legally founded right to water. Such an outcome in our view would be most unfortunate because in our region, we exist precariously in an extremely delicate and interdependent regional economy.

To avoid the economic disaster outlined above, the Pueblos of Laguna and Acoma, with BIA, State and Pueblo funds, have begun a search for new group water sources which might be feasible from the standpoint of both engineering and economic considerations. The first hole has to be drilled at a cost of $200,000, but four more will be needed with no additional funds now available. Congress must act if this effort is to continue.

Funds also will be needed to help us identify the extent of our practicably irrigable acres and our historical water use. Finally, funds will be required to design and construct water delivery systems and to design and implement a regulatory apparatus for ensuring that our water quality is protected.

In conclusion, I would like to offer a few words about the means by which our water rights might be resolved, the obvious alternatives being legislation, negotiation, litigation, or some combination of the three.

My basic message is that until the Lagunas have the better data base I have referred to several times during this presentation, we cannot make reasoned and rational decisions concerning the forum which will best protect our rights. We are keenly aware that our decisions today will affect our children for generations, and indeed will determine the very survival of our people.

I believe America stands for and recognizes our unique rights as Indians and appreciates our desire to protect what is left of our ancestral lands and communities.

Accordingly, we oppose any national legislation which would lump all tribal water rights together for the purpose of resolving them. We would hope instead that our water rights can be confirmed through a process of negotiation and cooperation which is tailored to our specific circumstances and needs.

What remains to be seen is whether Congress, the State, and all those interested in water will have the funding, the wisdom, and the patience to carry out such an important but challenging mission. Without the necessary financial resources at the inception, however, we have no choice but to litigate our claims to water.

We respectfully urge the Congress, therefore, to help us take the first step toward resolving our water claims because only you can. With financial support from the Congress, we can commence our journey on the road to a resolution of our water claims which guarantees access to water and thus a certain foundation for the greatly needed economic development of our Pueblo Laguna.

Thank you for your interest in this matter of great concern for the Pueblo of Laguna.

[The prepared statement of Governor Pedro follows:]

STATEMENT OF
VINCENTI PEDRO, SR., GOVERNOR, PUEBLO OF LAGUNA
BEFORE THE
SENATE SUBCOMMITTEE ON PUBLIC LANDS AND RESERVED WATER WORKSHOP ON INDIAN RESERVED WATER RIGHTS

June 19, 1984

Mr. Chairman, Senators, and other distinguished participants, my name is Vincenti Pedro, Sr., and I am the Governor of the Pueblo of Laguna of New Mexico. I greatly appreciate this opportunity to present information concerning an issue of great significance to Lagunas -- namely, our federally guaranteed water rights.

I have traveled here today to respectfully urge to the Congress and other participants that a resolution of the often unavoidable conflicts over Indian water rights in the Southwest and elsewhere depends upon a recognition of several factors, which I would like to summarize briefly now:

1. Each tribe is unique in its history and present circumstances as they relate to tribal water rights; resolutions of tribal water claims, therefore, must be accomplished on a strictly tribal-specific basis. Sweeping national solutions, legislative or otherwise, are not appropriate and are certain to infringe upon particular tribes' legal rights to water.

2. Before tribes reasonably can be expected to discuss in any forum issues concerning their water claims, they must have funds with which to inventory their water and arable land resources and to collect related information.

3. Tribes also should receive funds from their trustee, the federal government, to establish governmental institutions to regulate effectively water quality on reservations since federal environmental laws authorize federal monies for states but not for tribes. A welcome and important first step in this area would be a lifting of the Interior Department's moratorium on the approval of Indian water codes.

4. A major financial commitment by federal and state governments, as well as by industry, to the discovery and delivery of water to supplement existing over-appropriated sources should be coupled with a regional policy of water conservation to avoid the wasting of the less expensive water sources.

5. Finally, obstacles to the free market transfer of water should be removed. For example, the legal authority of tribes to lease their surplus Winters doctrine water to on- and off-reservation users should be made clear.

Let me now turn for the next few moments to a discussion of my own Reservation, the Pueblo of Laguna, to provide a specific context for the observations I have just made. The Pueblo of Laguna today has been placed through no fault of its own in an unconscionable position with regard to its water. Virtually every drop of water used by Lagunas since at least the 16th century has been diverted by upstream users. Historically, our people survived in an extremely arid region through the irrigation of approximately 3,000 acres, utilizing some 10,000 acre-feet per year from the Rio San Jose River's virgin flow of 26,000 acre-feet per year. This past year no more than 150 acre-feet were available from the Rio San Jose to irrigate 50 acres -- and no other surface water sources are available. Therefore, to protect the very key to our survival, in 1982 the United States filed a water trespass claim in federal court requesting substantial damages and prospective protective orders. The suit was dismissed in light of an ongoing state court stream adjudication.

Our water right is based on ownership of land and an accompanying water use dating back, as I mentioned above, to the 16th century. These aboriginal uses have been recognized under Spanish, Mexican and U.S. law (in the Treaty of Guadalupe Hidalgo). We believe that these rights were confirmed in the Treaty of Guadalupe Hidalgo and are contemplated by the Winters doctrine. We note, however, that the issue of the source of pueblo water rights is in litigation in the 10th Circuit in New Mexico v. Aamodt.

These judicial actions, unfortunately, consume vast amounts of time, energy, goodwill, and monetary resources, and in an ultimate sense do not even solve the real dilemma facing both Indians and non-Indians -- that is a lack of sufficient water. Instead, the litigation promotes contention, making enemies of friends and potential friends and, of course, frequently pitting Indian against non-Indian. We have no choice, however, but to use any effective means available to us to protect our longstanding and vital right to water. A first step in this regard, understandably, is litigation. But, unless new water sources are developed, existing and largely non-Indian users may find their rights significantly diminished so that we at last may utilize our legally-founded right to water. Such an outcome, in our view, would be most unfortunate because in our region we exist precariously in an extremely delicate and interdependent regional economy.

To avoid the economic disaster outlined above, the Pueblos of Laguna and Acoma, with BIA, state and Pueblo funds, have begun a search for new groundwater sources which might be feasible from the standpoint of both engineering and economic considerations. The first hole has been drilled at a cost of $200,000, but four more will be needed with no additional funds now available. Congress must act if this effort is to continue. Funds also will be needed to help us identify the extent of our "practicably irrigable acres" and our historical water use. Finally, funds eventually will be required to design and construct water delivery systems, and to design and implement a regulatory apparatus for ensuring that our water quality is protected.

In conclusion, I would like to offer a few words about the means by which our water rights might be resolved -- the obvious alternatives being legislation, negotiation, litigation, or some combination of the three. My basic message is that until the Lagunas have the better data base I have referred to several times during this presentation, we cannot make a reasoned and rational decision concerning the forum which will best protect our rights. We are keenly aware that our decisions today will affect our children for generations and, indeed, will determine the very survival of our people. I believe America stands for and recognizes our unique rights as Indians and appreciates our desire to protect what is left of our ancestral lands and communities.

Accordingly, we emphatically oppose any national legislation which would lump all tribal water rights together for purposes of resolving them. We would hope, instead, that our water rights can be confirmed through a process of negotiation and cooperation which is tailored to our specific circumstances and needs. What remains to be seen is whether Congress, the state and all those interested in the water will have the funding, the wisdom, and the patience to carry out such an important but challenging mission. Without the necessary financial resources at the inception, however, we will have no choice but to litigate our claims to water.

We respectfully urge the Congress, therefore, to help us take the first step toward resolving our water claims -- because only you can. With financial support from the Congress, we can commence our journey on the road to a resolution of our water claims which guarantees access to water and, thus, a certain foundation for the greatly needed economic development of our pueblo.

Thank you for your interest in this matter of great concern to the Pueblo of Laguna.

Mr. Muys. Thank you, Governor. It is certainly frustrating to me at least hearing this, thinking of the rather modest sum that would probably be involved in doing some of this basic data collection that is essential, whatever we do, and to think that Congress is struggling at the moment with a $260 billion Department of Defense authorization bill.

DOD will probably lose as much as we are talking about here in their petty cash account in the next few months. Anyhow, we have got to get our priorities straight somewhere.

Now let's hear from the Chippewa Cree Tribe, Mr. Joe Rosette.

STATEMENT OF JOE ROSETTE, COUNCILMAN, CHIPPEWA CREE TRIBE

Mr. Rosette. Thank you, Mr. Chairman. My name is Joe Rosette, and I am a councilman from the Chippewa Cree Tribe of Rocky Boy Reservation, and we would like to present what little we have to offer.

First of all, on behalf of the members of the Chippewa Cree Tribe, we would like to thank the Honorable Senator Wallop and the members of this committee for the opportunity to present the views and concerns of the Chippewa Cree Tribe.

The Rocky Boy's Indian Reservation is located in the Bear Paw Mountains of north central Montana and is the homeland of our tribe. Rocky Boy Reservation is different in several respects from other reservations located in the State of Montana. Not only is it the smallest in terms of land base and population. It also has the distinction of being the most economically depressed.

The primary sources of income for the tribe are royalties from natural gas production and revenues from Dry Fork Farms, a tribal farm enterprise, but gas revenues are dwindling rapidly. The tribe must now rely on expansion of our Dry Fork Farms and other agricultural enterprises to provide the revenues necessary to maintain the Chippewa Cree Tribe.

With the tribe's future heavily reliant upon revenues from agriculture, the availability of water and the right to use it is a major concern. The solutions we propose may be summarized briefly but not necessarily in their order of importance as follows.

No. 1, legislation to restore the exclusive jurisdiction of Federal courts over Indian water rights as Federal trust properties, as Congress expressly mandated in Public Law 280 and with respect to tribal properties in the Montana Enabling Act; No. 2, provision to ensure adequate resources for the independent legal representation from the separate, competing interests of the various tribal entities and the U.S. Government, whether in the existing forums for informal negotiation or by formal adjudication, or a combination of both; immediate action to fund and implement water development programs.

The problem for the Chippewa Cree Tribe on the Rocky Boy Reservation is especially acute. Service water on the Rocky Boy Reservation is extremely limited. The average annual yield on the Rocky Boy Reservation is only 16,000 acre feet annually, much of which comes during the nonirrigation months.

Engineering studies indicate that if all possible storage sites on the Rocky Boy's Reservation were developed, the tribe would only have an average annual usable surface water supply of about 11,000 acre-feet—barely enough to irrigate 5,000 acres. Although the Chippewa Cree Tribe aboriginally occupied the area in which the present reservation now lies and should hold a prior and paramount right with respect to non-Indian claims, Rocky Boy's Reservation was not created by act of Congress until 1916, and non-Indians in downstream areas claim earlier priorities on most of Rocky Boy's water supply.

The situation is compounded by the fact that the Federal Government itself claims reserved water rights for a variety of purposes in the Milk River system which conflict with the Rocky Boy's water rights.

Nonetheless, the tribe is faced with the very complex and extremely expensive task of advocating and protecting its all-important water rights. Not only have the Federal Government and the State of Montana failed to take Rocky Boy's needs and water rights into account over the past century while non-Indian water uses were being developed, but the Federal Government itself claims conflicting water rights.

Despite the provision in the new Montana water rights law that the Indian tribal water rights will not be adjudicated in State courts so long as the tribes are engaged in negotiations with the Montana Reserved Water Rights Compact Commission, the Montana Water Court has issued at least one preliminary decree on a Milk River tributary stream on which the Chippewa Cree Tribe holds water rights.

While the matter is still in its very preliminary stages, the tribe is extremely concerned that the adjudication procedures adopted by the Montana Water Court will deny the tribe the opportunity to challenge inflated non-Indian water rights claims while potentially subjecting the tribal claims to extensive non-Indian challenge when and if they are adjudicated in court in the absence of a negotiated compact.

The McCarran amendment waived the sovereign immunity of the United States as to comprehensive State water rights adjudications so that certain Federal water rights could be adjudicated in State courts. Although the amendment does not mention Indian reserved water rights and there is no evidence that Congress actually intended Indian reserved rights to be adjudicated in State courts pursuant to the McCarran amendment, the Supreme Court has decided that State courts do have jurisdiction to adjudicate Indian water rights held in trust by the United States, and that State courts are in fact the preferred forum.

As described, reserved rights in Western States, of course, present enormous problems in addition to subjecting the tribe's rights to adjudication and administration by historically hostile forces, and I would like to add some more for myself, but due to the short time we have here, I would like to turn it over to Mr. Wright who will finish up, and thank you very much, Mr. Chairman.

Mr. MUYS. Fine; thank you.

STATEMENT OF DARRELL WRIGHT, WATER RESOURCE COORDINATOR, CHIPPEWA CREE TRIBE

Mr. Wright. Thank you, Mr. Chairman. I would like to thank the other panelists here and members of the committee for the opportunity to again present our proposed solutions.

Before I go into the proposed solutions that were identified by Mr. Rosette, I would like to make a statement that these solutions and the problems that we have identified are unique to the Chippewa Cree Tribe. They are not intended to be the answer or the solutions to all the tribes that are here participating in this hearing, so with that, I would like to go on and go through each one of these proposed solutions.

The first solution, proposed solution, that the Chippewa Cree Tribe is concerned with is the development of water resources. The underlying problem to be pointed out is the longstanding failure to develop water supplies both to fulfill our legal rights and to bring the desperately lagging economies of our underdeveloped reservations up to minimal standards.

In Montana that problem is soluble without joepardizing anyone else's property rights. With respect to surface water, studies have shown that there are adequate supplies in the Missouri River within reach of the Rocky Boy Reservation to meet at least a substantial portion of its needs and to serve other Indian and non-Indian interests as well.

Action to develop available water supplies for the reservations is perhaps the most important single step toward eliminating the unnecessary but pervasive fear of the divisiveness that might be caused by the pending adjudications of Indian water rights. This committee can make a major contribution to the abatement of that problem as well as of the heavy Federal burden of subsidizing the tragically underdeveloped tribal economies by, one, the appropriation of funds for surface and ground water development to serve the reservations, and two, congressional oversight to ensure that the Interior Department implements such development projects with all due speed.

The second proposed solution that we would like to address is the restoration of Federal jurisdiction. This situation is complicated by the priority given by State law and by Federal policy favoring the negotiation of tribal water rights with State agencies. Under Montana law, State court adjudication of tribal laws but not of the competing non-Indian rights, is suspended for a limited time if a tribe chooses to enter negotiations to define and determine its water rights by agreement with the State compact commission.

Theoretically, this course is optional, but in reality Federal policy denies funding for independent legal representation of our interests in the courts and provides extremely limited funding for legal expenses only for the purposes of negotiation. In order to obtain any legal advice at all, Rocky Boy's only option was to enter negotiations with the State which we are now doing.

I can assure you that we have done so in good faith, with every intention of succeeding, but the signs, judging from the experience of both parties in other cases, are not good. In the event of failure, the tribe's formal claims must be completely developed and submitted to the State water courts by next year.

The situation is further complicated by the piecemeal approach taken by the State water courts to the adjudication now proceeding of all other rights in our river basins. Pending the outcome of our negotiations with the State, the determination of water rights in our reservation are now pending in four separate State courts involving interrelated tributaries and subtributaries of the Milk River system. This violates the express requirement of the McCarran amendment for the unified adjudication of a complete stream system.

The sole reason for the Supreme Court's action in deferring to State court adjudication was to achieve efficiency and simplicity in the process. Its misapprehension of congressional intent in passing the McCarran amendment has manifestly achieved the opposite result.

The obvious solution is for Congress to modify the language of the McCarran amendment to make clear the exclusion of Indian water rights from the State court jurisdictions and thus restore the protections mandated by Congress in the Montana Enabling Act and Public Law 280.

The third proposed solution that we would like to address is the provision of adequate legal representation and consultants to assist in preparation for negotiations or litigation.

The United States, as trustee for the tribal assets, is a party to *United States* v. *Aageson* in the Federal district court. The Justice Department also intends to represent the Chippewa Cree Tribe in any State court adjudication proceedings which may take place.

The trustee itself is, however, subject to severe conflict of interests and unable to adequately represent the tribe. The tribe must prepare both for negotiation with the Montana Reserved Water Rights Compact Commission and for litigation in the State and/or Federal cour to protect its rights.

Adequate preparation for both the negotiation and adjudication proceedings will cost a minimum of several hundred thousand dollars for technical, engineering and economic assistance and for legal counsel. The administration has in the meantime progressively reduced the Interior Department's and the Bureau of Indian Affairs' budgets. Thus far the United States, which has a major interest in effectively facilitating the resolution of conflicting Western water rights claims, has failed to provide anywhere near adequate funding to the Chippewa Cree Tribe for its water rights work. Adequate funding must be provided if there is any hope of successfully and expeditiously concluding the adjudication of Indian water rights in the Northwest.

Even more serious is the effect of Federal policy which I just referred to which holds all funding for such studies and for legal representation hostage to the tribe's participation in the negotiation process. Not only does this severely weaken our bargaining position, but prolonged and undue delays by the Bureau of Indian Affairs in the processing of funding requests and the unjustifiable cuts in allocations for legal fees make increasingly remote any chance of us concluding the negotiations before the expiration of the State statutory deadline next year.

In light of these funding shortages, there is no prospect that either the Federal Government or the tribe will be prepared at that time to defend the tribe's right as State law requires.

The tribe, therefore, urges this committee to recommend legislation, one, to require the Interior Department to rescind its pernicious policy of limiting funds for the legal protection of tribal water rights exclusively to the negotiation process, and two, to reinstate adequate funding available for tribal preparation as well as for governmental studies, for technical studies and legal expenses requisite to the expeditious determination of Indian reserved water rights, and with that I would like to again thank everybody for giving us the opportunity to present our reasons.

[The prepared statement of Mr. Windy Boy follows:]

STATEMENT OF JOHN WINDY BOY

Chairman of the Chippewa-Cree Tribe of
the Rocky Boy's Reservation, Montana

Before the Subcommittee on Public Lands
and Reserved Water of the Senate Committee
on Energy and National Resources

June 19, 1984

I. INTRODUCTION

First of all, on behalf of the members of the Chippewa-Cree Tribe, we would like to thank the Honorable Senator Wallop and the members of this Committee for the opportunity to present the views and concerns of the Chippewa-Cree Tribe.

The Rocky Boy's Indian Reservation is located in the Bear Paw Mountains of North-central Montana and is the homeland of the Chippewa-Cree Tribe. The Reservation consists of 107,613 acres which vary from rolling high plains grasslands to the sub-alpine habitat of the Bear Paw Mountains.

The Reservation was established by an act of Congress (39 Stat. 739) on September 7, 1916. It originally consisted of four townships of the abandoned Fort Assiniboine Military Reservation, which was set aside for Chief Rocky Boy and other homeless Indians located in the State of Montana. "Such other homeless Indians" principally referred to Chief Little Bear and his band of Cree Indians. However, for decades prior to the establishment of the Reservation, both bands had shared campsites throughout Montana and had intermarried to the point that there was little or no distinction between the Chippewa and Cree tribe.

Although Chief Rocky Boy did not live to see the results of his efforts, the Reservation bears his name in honor of his sacrifices to establish a home for the future generations of the tribes.

The Rocky Boy's Reservation is different in several respects from other reservations located in the state of Montana. Not only is it the smallest in terms of land base and population, it also has the distinction as being the most economically depressed. There are approximately 3,000 enrolled members of the Chippewa-Cree Tribe, of which 2,100 members are presently residing on the Rocky Boy's Reservation. While the state unemployment rate is 8%, the Tribe's latest labor force statistics completed in April, 1984, show a current level of 73% unemployment for the Rocky Boy's Reservation. During winter months its goes as high as 85%.

The primary sources of income for the Tribe are royalties from natural gas production and revenues from Dry Fork Farms (a tribal farm enterprise). But Gas revenues are dwindling rapidly, however, the Tribe must now rely on the expansion of Dry Fork Farms and other agricultural enterprises to provide the revenues necessary to maintain the Chippewa-Cree Tribe. Although the Tribe is seeking to develop other resource areas on the Reservation, preliminary studies indicate that only agricultural-based enterprises offer hope of producing major income over the long term.

With the Tribe's future heavily reliant upon revenues from agriculture, the availability of water and the right to use it is a major concern. In the following pages we will provide an overview of the Tribe's concerns, and proposed solutions as they pertain to tribal reserved water rights. The solutions we propose may be summarized briefly—not necessarily in the order of their importance--as follows:

1. Legislation to restore the exclusive jurisdiction of the federal

courts over Indian water rights as federal trust properties, as Congress expressly mandated in Public Law 280 and with respect to tribal properties in the Montana Enabling Act.

2. Provision to ensure adequate resources for the independent legal representation of the separate, competing interests of the various tribal entities and the United States government, whether in the existing forums for informal negotiation or by formal adjudication, or a combination of both.

3. Immediate action to fund and implement water development programs, both to eliminate the pervading but groundless fears that Indian water rights cannot be fulfilled without undermining other existing uses, and to overcome at long last the shameful state of poverty to which the lack of such development programs have relegated our people.

II. OVERVIEW OF TRIBAL WATER RIGHTS

Until recently, no attempt was ever made to clarify or to adjudicate Chippewa-Cree water rights associated with the Rocky Boy's Reservation. In 1979, the United States filed United States v. Aageson, a general stream adjudication of water rights in the Milk River system, including reserved rights for the Rocky Boys, Blackfeet, Fort Belknap and Fort Peck Indian reservations, in federal district court for Montana. The United States claimed reserved rights on its own behalf and as trustee for the tribes of the four reservations. Although the United States Department of Justice is subject to serious conflicts of interest, and cannot adequately represent the interests of the Chippewa-Cree Tribe in any water rights adjudication proceedings, the Tribe was unable to intervene in United States v. Aageson because of lack of resources.

Late in 1979, the federal court dismissed United States v. Aageson, together with six other cases involving Indian water rights in Montana, in favor of state court proceedings under Montana's Water Use Act. The Chippewa-Cree Tribe adamantly contends that Indian reserved water rights should be adjudicated in federal court for the reason that state governments and state courts have historically been hostile to Indian interests, and federal courts are far less prone to be influenced by local political considerations because federal court judges are appointed for life, and are not concerned with maintaining the favor of local voters.

The United States and the tribes who filed or intervened in the federal court water rights adjudications appealed the dismissals to the 9th Circuit Court of Appeals. A number of cases, including United States v. Aageson, were consolidated before the Ninth Circuit, which heard them as Northern Cheyenne Tribe v. Adsit. The 9th Circuit reversed the dismissals and remanded to the Montana District Court for further proceedings. Montana petitioned the United States Supreme Court for certiorari, which was granted. On July 1, 1983, the Supreme Court reversed the 9th Circuit Court of Appeals, concluding that the congressional intent behind the 1952 McCarran Amendent was that Indian reserved water rights should be adjudicated in comprehensive water rights adjudications in state courts, and that the state jurisdictional disclaimer over Indian lands contained in the Montana Enabling Act does not prohibit adjudication of Indian reserved water rights in state court proceedings.

All Indian tribes who claim Winters Doctrine reserved water rights are extremely concerned about the impact of the Supreme Court's decision in Adsit. From the perspective of the tribes, the Adsit decision subjects their all-important water rights to the tender mercies of their historic enemies, state governments. Although the Supreme Court in its Adsit decision did state that any state court decision alleged to abridge Indian water rights protected by federal law will receive exacting scrutiny to safeguard those rights from state encroachment if brought before the Supreme Court, it is clear to the tribes that in view of the work load of the Court, state courts adjudicating Indian reserved rights will receive, at best, only sporadic supervision from the Supreme Court. Perhaps of greatest concern to the tribes is the fact that the Adsit decision will result in a major incursion by state government into Indian tribal jurisdiction and sovereignty. Water rights decrees issued by state courts will be administered by appropriate state government agencies (the State Engineer's Office or its equivalent in most western states), and state courts and agencies will enforce such decrees. This situation will necessarily subject Indian water rights to state administration.

III. PROBLEMS FACING THE CHIPPEWA-CREE TRIBE

The problem for the Chippewa-Cree Tribe of the Rocky Boy's Reservation is especially acute. Surface water on the Rocky Boy's Reservation is extremely limited; the annual average yield of runoff on the Rocky Boy's Reservation is only 16,000 acre feet annually, much of which comes during the non-irrigation months. Engineering studies indicate that if all possible storage sites on the Rocky Boy's Reservation were developed, the Tribe would only have an average annual usable surface water supply of 11,000 acre feet, barely enough to irrigate 5,000 acres. Although the Chippewa-Cree Tribe aboriginally occupied the area in which the present Reservation now lies, and should hold a prior and paramount right with respect to non-Indian claims, Rocky Boy's Reservation was not created by act of Congress until 1916, and non-Indians in downstream areas claim earlier priorities on most of Rocky Boy's water supply. The situation is exacerbated by the fact that the federal government itself claims reserved water rights for a variety of purposes in the Milk River system which conflict with Rocky Boy's water rights.

As noted above, reservation-derived revenues for the Chippewa-Cree Tribe are extremely limited, and fall far short of meeting basic tribal government needs. Nonetheless, the Tribe is faced with the very complex and extremely expensive task of advocating and protecting its all-important water rights. Not only have the federal government and the state of Montana failed to take Rocky Boy's needs and water rights into account over the past century while non-Indian water uses were being developed, but the federal government itself claims conflicting water rights. Moreover, the federal government and the State of Montana have administered water rights, water supplies and water uses from the Milk River system in an irresponsible manner. The Milk River system is over-appropriated by many times, waste is endemic, and the state, in an effort to enlarge the totality of its water rights with respect to downstream Missouri River basin states, has embarked upon a system of water rights adjudications which ratifies, as a matter of legislative policy, inflated non-Indian water rights claims.

Despite the provision in the new Montana water rights law that Indian tribal water rights will not be adjudicated in state court for so long as the tribes are engaged in negotiations with the Montana Reserved Water Rights Compact Commission, the Montana Water Court has issued at least one preliminary decree on a Milk River tributary stream on which the Chippewa-Cree Tribe holds water rights (Sage Creek). While the matter is still in its very preliminary stages, the Tribe is extremely concerned that the adjudication procedure adopted by the Montana Water Court will deny the Tribe the opportunity to challenge inflated non-Indian water rights claims while potentially subjecting the tribal claims to extensive non-Indian challenge when and if they are adjudicated in court in the absence of a negotiated compact.

In 1979 the Department of the Interior adopted a policy of preparing an inventory of Indian water rights, and the Bureau of Indian Affairs prepared a 10-year budget estimating the funding required to complete the inventory. Much of the preparation for the adjudication of western Indian water rights could have been accomplished in the process of preparing the inventory. The Bureau of Indian Affairs estimated that $200 million would be required. To date, less than $20 million has been made available. None of the requisite studies, either for negotiation or adjudication, has been completed for the Rocky Boy's Reservation, and only minimal funding for preliminary reviews has recently been made available.

The McCarran Amendment waived the sovereign immunity of the United States as to comprehensive state water rights adjudications so that certain federal water rights could be adjudicated in state courts. Although the Amendment does not mention Indian reserved water rights, and there is no evidence that Congress actually intended Indian reserved rights to be adjudicated in state courts pursuant to the McCarran Amendment, the Supreme Court has decided that state courts do have jurisdiction to adjudicate Indian water rights held in trust by the United States, Colorado River Conservation District v. United States, 424 U.S. 800 (1976), and that state courts are in fact the preferred forum. Montana v. Northern Cheyenne Tribe, _ U.S. _ (1983). As described above, however, the threat of imminent adjudication of tribal Winters Doctrine reserved rights in Western state courts presents enormous problems, in addition to subjecting the Tribe's rights to adjudication and administration by historically hostile forces.

IV. PROPOSED SOLUTIONS

1. Development of Water Supplies

The underlying problem to be addressed is the longstanding failure to develop water supplies both to fullfill our legal rights and to bring the desperately lagging economies of our underdeveloped reservations up to minimal standards. In Montana, that problem is soluble without jeopardizing anyone else's property rights. With respect to surface waters, studies have shown that there are adequate surplus supplies in the Missouri River, within feasible reach of the Rocky Boy's Reservation, to meet at least a substantial portion of its needs—and to serve other Indian and non-Indian interests, as well.

One of the most distressing failures from our point of view has been the almost total lack of exploration for groundwater reserves on our Reservation. Yet some of our most irrigable lands, for which additional water supplies are now urgently needed, were once traversed by the great Missouri River itself, and that ancient riverbed is still evident on the surface of those lands. Groundwater development obviously offers a promising partial, if not complete, solution to the combined problem of water rights and economic development on the Rocky Boy's Reservation.

Action to develop available water supplies for the reservations is perhaps the most important single step toward eliminating the unnecessary but pervasive fear of divisiveness that might be caused by the pending adjudications of Indian water rights. This Committee can make a major contribution to the abatement of that problem, as well as of the heavy federal burden of subsidizing the tragically underdeveloped tribal economies, by recommending (1) the appropriation of funds for surface and groundwater development to serve the reservations, and (2) Congressional oversight to ensure that the Interior Department implement such development projects with all due speed.

2. Restoration of Federal Jurisdiction

In subsequent proceedings following the Adsit decision, the federal court cases were reinstated for the sole purpose of providing an efficient appeals mechanism, in the event of a "change in circumstances", or of a later showing that the state-court proceedings mandated by the Supreme Court are inadequate. As a result, the adjudication of the property rights of our Tribe and other tribes is now pending both in federal and state district courts.

This situation is complicated by the priority given by state law and by the federal policy favoring negotiation of tribal water rights with state agencies. Under Montana law, state court adjudication of tribal rights—but not of competing non-Indian rights—is suspended for a limited time if a tribe chooses to enter negotiations to define and determine its water rights by agreement with the State Compact Commission. Theoretically, this course is optional, but in reality federal policy denies funding for independent legal representation of our interests in the courts, and provides extremely limited funding for legal expenses only for purposes of negotiation. In order to obtain any legal advice at all, Rocky Boy's only option was to enter negotiations with the state, which we are now doing. I can assure you that we do so in all good faith, with every intention of succeeding, but the signs, judging from the experience of both parties in other cases, are not good. In the event of failure, the Tribe's formal claims must be completely developed and submitted to the state water courts by next year.

The situation is further complicated by the piecemeal approach taken by the state water courts to the adjudication now proceeding of all other rights in our river basins. Pending the outcome of our negotiations with the state, the determination of the water rights in our Reservation are now pending in four separate state court cases involving interrelated tributaries and subtributaries of the Milk River system. This violates the express requirement of the McCarran Amendment for unified adjudication of a complete stream system. The sole reason for the Supreme Court's action in deferring to state court adjudications was to achieve efficiency and simplicity of process. Its misapprehension of Congressional intent in passing the McCarran Amendment has manifestly achieved the opposite result.

The obvious solution is for Congress to modify the language of the McCarran Amendment to make clear the exclusion of Indian water rights from state court jurisdiction, and thus restore the protections mandated by Congress in the Montana Enabling Act and P.L.280.

3. Provision of Adequate Legal Representation

The United States, as trustee for the tribal assets, is a party to United States v. Aageson in federal district court. The Justice Department also intends to litigate, as trustee for the Chippewa-Cree Tribe, in any state-court adjudication proceedings which may take place. The trustee itself is, however, subject to severe conflict of interests and unable to adequately represent the Tribe. The Tribe must prepare both for negotiations with the Montana Reserved Water Rights Compact Commission and for litigation in state and/or federal court to protect its rights. Adequate preparation for both the negotiations and the adjudication proceedings will cost a minimum of several hundred thousand dollars for technical, engineering and economic expert assistance, and for legal counsel. The Administration has, in the meantime, progressively reduced the Interior Department's and Bureau of Indian Affairs' budgets. Thus far, the United States, which has a major interest in effectively facilitating the resolution of conficting western water rights claims, has failed to provide anywhere near adequate funding to the Chippewa-Cree Tribe for its water rights work. Adequate funding must be provided if there is to be any hope of successfully and expeditiously concluding the adjudication of Indian water rights in the West.

Even more serious is the effect of the federal policy referred to above, which holds all funding for such studies and for legal representation hostage to a tribe's acquiescence in negotiations. Not only does this severely weaken our bargaining position, but prolonged and undue delays by the Bureau of Indian Affairs in the processing of funding requests, and unjustifiable cuts in allocations for legal fees, make increasingly remote any chance of concluding the negotiations before expiration of the state's statutory deadline next year. In light of these funding shortages, there is no prospect that either the federal government or the Tribe will be prepared at that time to defend the Tribe's rights in court, as state law requires.

The Tribe therefore urges this Committee to recommend legislation (1) to require the Interior Department to rescind its pernicious policy of limiting funds for the legal protection of tribal water rights exclusively to negotiating purposes, and (2) to reinstate adequate funding, available for tribal preparation as well as for governmental studies, for the technical studies and legal expenses requisite to the expeditious determination of Indian reserved water rights.

Mr. MUYS. Thank you, Mr. Wright, for that bill of particulars. I think we have heard from the Chippewa Cree community. Let's move on to the Federal Government, the Department of Justice, Mr. Meshorer, and then Interior.

Hank?

STATEMENT OF HANK MESHORER, CHIEF, INDIAN RESOURCES SECTION, DEPARTMENT OF JUSTICE

Mr. MESHORER. Thank you, Jerry. I don't think the litigation option can be denied altogether. I don't think there is any shape or form that could come out of this committee or Congress that could deny an individual water right user his day in court.

I think that includes Indian water rights as well, but it can be minimized by discouraging litigation in various ways.

The problem, as we noted today, is not judicial in nature. It is legislative in that it is not a suit of one person versus another, but a controversy involving a whole group of people, Indian as well as non-Indian. As I view it, the main problem is attitudinal. This is a hopeful start, but it is really a question of what do we all want to get out of this? Do you want it to be a forum to state your view of how bad the other person is and how good you are?

You are not going to get very far except to state your view and feel pretty good for 5 minutes. If it is a start toward a search for the common ground, I hope to God it works because that is the only way as far as I can see because I live with this stuff. I know what happens when you litigate. Nobody wins—nobody.

A word to the State as much as to the Indian community—litigation in State court is not the panacea for State interests. So far we have had a pretty good track record in State court. We have gotten essentially everything we have asked for. There have been areas where we have not gotten the amount of water we requested, and aside from the fact that we lost the jurisdictional battle in our State court, when we do go to State court on the merits, we usually get what we thought we were entitled to all along, so the State court system may not be as bad as you all might think on the Indian side of the dock, and it might not be the end-all as far as non-Indians are concerned—all the more reason to try to reach the common ground.

I think the settlement scenario can be further enhanced if we look at it as a thousand mile journey that begins with the first step, and that is a hearing such as this. Rather, not a hearing but a workshop, where we start by stating general principles which we already have, and that is that we all think that we should try to settle this matter. We are all in the same room for the first time, and it is not a courtroom. We can state our views more informally, a little bit more informally than we would in court and move more in a positive direction where we agree.

There are a thousand reasons why these cases should not be settled. If you don't want to settle them, any one of those reasons is real good. If you want to settle them, those thousand reasons don't amount to a hill of beans.

I believe this is a Western problem that should be solved by westerners. We are moving in that direction.

That is about all I have got to say.

Mr. MUYS. Thanks, Bob. You are speaking from the voice of experience. You're out there in the trenches all the time, so we appreciate your views on the futility of litigation.

Paul?

STATEMENT OF PAUL BAIRD, ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. BAIRD. First I would like to offer Bill Horn's regrets for not being here. Mr. Horn did want to participate in this workshop. In fact, he was in the building about 2½ hours ago, but he got called away and asked me to fill in for him.

Assistant Secretary Smith said this morning that he is very interested in getting wet water to the Indians, and that is essentially our basic goal: to get wet water to the Indians who want it.

With that in mind, Secretary Watt initiated the Water Policy Advisory Group and the negotiating process under the chairmanship of Deputy Under Secretary Horn a couple of years ago. To be perfectly honest, we haven't got a whole lot to show for it yet, but just like the litigation process, the negotiation process is slow and tedious, and it takes time to get going.

There are several impediments to progress. One of them, I think, is attributable to non-Indians. There are non-Indian water users out there who would love to delay quantification of Indian water rights just as long as they can because they figure that as long as they keep the Indians in court, they are going to be able to continue to use the water. That is really what they are interested in—in using the water as long as they can; they hope that by the time the matter is fully litigated there will be another solution to the problem—one which won't require them to give up water to the Indians.

There are also Indians who want to delay the process. We have heard Indians speak here today who do not want their water rights quantified because they feel that somewhere down the road with the new technology maybe they might be able to claim more water rights than they can claim under the existing standard.

There is also a matter of distrust. We recognize that there are Indians who in good faith distrust the United States of America—the Department of the Interior, the Secretary and the Assistant Secretary. We try to deal with that, but it is of longstanding duration.

There is a matter of dollars. We have heard it suggested today by Chris Baker, for example, that the Animas-La Plata project would lead to a settlement of the Southern Ute water claim; but that project would probably cost about a half a billion dollars. I doubt if there are very many water claims that are pending that couldn't be settled with the proper application of greenbacks, but the money hasn't been available and I don't think it is going to become available in sufficient amounts to settle many claims.

One of the problems of negotiating is that usually there is going to have to be some sort of project involved. Either there is going to have to be a project to develop new water sources, or there is going to have to be a project to provide storage for existing water, so it will be available, and those things cost money.

We have dealt with the impediment of lack of negotiating authority. We have heard today about the situation in Montana and about the letter that Secretary Clark sent to Governor Schwinden. There is a copy of it attached to Mr. Boggs' testimony, which I assume will be a part of the transcript, and I would invite you to read it. The problem we ran into in negotiating with Montana was that after we had negotiated a settlement with the compact commission, we found out the compact commission didn't have any authority to negotiate, and Secretary Clark made it very clear in his letter to Governor Schwinden that we couldn't go back to the negotiating table until we knew that the negotiators had authority to cut a deal.

In order to negotiate effectively, there has to be a willingness on the part of the parties to compromise. I heard it said today that a gallon of water in hand is worth five in the bush, and I am not stating any quantity, but we know that something in hand is worth a lot more than something out there somewhere in the far distant future, and if people aren't willing to negotiate, if they are not willing to compromise on both sides, then we are not going to have negotiated settlements.

If you think as an Indian tribe that every acre on your reservation is practicably irrigable, chances are you are not going to have negotiated water settlements because nobody can negotiate on that basis.

On the other hand, if you as a non-Indian think that because you have been using water for 30 years that Indians can't take it away from you and you are not even going to consider giving up some of it, then you are not going to be able to negotiate a settlement either.

It is not our intention or desire for anyone to enter into negotiations against his will. Frankly, we have about all the business we can handle right now negotiating with people who are interested in negotiating. We seriously believe that negotiation is the best potential solution in many instances. It is not the answer in all situations. There is a strong secretarial commitment to negotiations. There is a strong commitment on the part of the Solicitor-designate for negotiations, and I think once the Solicitor gets confirmed you are going to see a renewed commitment to settling water claims.

One of the possible solutions that was discussed is legislation. I believe, as others have stated, that each case is unique, and that there is no overriding legislative solution to all of the existing water claims. However, legislation is often an essential component of a negotiated settlement. It may require a Federal contribution. It may require construction of some kind of facility. It may require a congressional ratification of a water quantification. In many instances legislation is going to be an essential part of a negotiated settlement.

As far as litigation is concerned, it is costly. It is time consuming. It is risky. We are living in a dream world if we think that the Supreme Court, which announced the Winters doctrine in 1908, is not going to be increasingly subject to pressure some time in the future to reassess the Winters doctrine if these water cases continue indefinitely. Moverover, litigation provides only a paper water right, it doesn't provide any wet water.

There is another alternative, and that is do nothing; but that isn't effective in many cases. The Department of the Interior is not running into State into courts filing water cases. Under the *San Carlos* decision, which was mentioned here earlier, the Supreme Court has said that the United States is subject to jurisdiction in State court in connection with the adjudication, under the McCarran amendment of Indian reserved water rights in general stream adjudications. We are going in the State court because the cases are being filed in the State court and the United States is a defendant. Once a general stream adjudication has been filed, we must appear and present claims as trustee for any affected Indian tribe.

In Montana the State legislature created the compact commission specifically for the purpose of negotiating Indian water claims. As the representatives from the Rocky Boys Reservation have indicated, they have been involved in negotiations. We negotiated on behalf of Fort Peck. Five of the tribes in Montana have indicated a willingness to negotiate, but the Commission expires on July 1 of next year and if compacts aren't negotiated, and I don't see now how any compact can be negotiated and ratified before July 1 of next year.

It appears, therefore, that we are going to be in the State court for all of the reservations in the State of Montana. We have done an in-house study which has estimated it is going to cost $30 million just for us to prepare for litigation for the reservations in the State of Montana. What does that mean? That means that with the limited resources we have, we are being driven by litigation. At the same time, however, we continue to look for cases that are susceptible to negotiation. The Water Policy Advisory Group is functioning. We have a meeting on Thursday of this week with representatives of the Ute Tribe in Utah, Uintah Reservation, to discuss their water rights.

The group has a meeting on Friday of this week with representatives of the Wind River Reservation and the State of Wyoming to discuss the Big Horn case. That is an interesting situation because the State court in Wyoming awarded 477,000 acre-feet of water to the Wind River Reservation. It is not all that we asked for, but it is 477,000 acre feet, more than the State acknowledged that the tribe was entitled to, and in many respects it is a substantial victory for the tribe.

Nonetheless, the tribe has indicated a willingness to negotiate, and we are optimistic that we will be able to put this matter to rest without having to appeal it all the way to the U.S. Supreme Court.

I would invite any tribe or other interested group who is interested in negotiation and who wants to see if the Department of the Interior can assist in facilitating a negotiated settlement to submit your request to the Solicitor or the Secretary or to the Assistant Secretary for Indian Affairs, and we will offer you an opportunity to meet with the Water Policy Advisory Group and present your case. We will give it our best effort to see if something can be done.

Thank you.

Mr. MUYS. Thank you, Paul. Let's hear from the States now, the Western States Water Council, John Spencer.

STATEMENT OF JOHN SPENCER, WESTERN STATES WATER COUNCIL

Mr. SPENCER. Thank you, Mr. Chairman. I would like to preface my remarks a little bit by saying that I am representing the Western States Water Council and have previously worked for the State of Washington, but most of the views I am going to convey to you today are my personal views. Since I left very recently the work with the State, and from that point, I have had the luxury so to speak of looking back on the situation, and gaining some personal observations.

Solutions to disputes over water that are subject to Indian water rights range over a very wide spectrum, from win or lose litigation to doing nothing, and which approach is best at solving these disputes seems to be evolving slowly as more attention is focused on inadequacy of water supply to meet increasing needs.

Many disputes are stuck in the do nothing end of the spectrum, raising the possibility of lengthy litigation. While some parties to a dispute become impatient, others feel threatened by potential loss of water.

Now to move beyond the polarized approaches of litigation or doing nothing, I believe there needs to be an intergovernmental process or governmental institution created that will facilitate solutions to disputes over Indian water rights rather than relying on a long-term evolutionary process that waits for a dispute to be so controversial that litigation or political actions result in the imposition of solutions on one or more of the parties involved.

Solutions to Indian water rights disputes will not be found as long as the search takes place within the context of State jurisdiction versus Federal jurisdiction. If solutions are available to any of the numerous Indian water rights disputes, they are invariably lost in the heated and sometimes emotional discussions over States rights versus Federal and Indian reserved rights administration. Such arguments create very difficult, if not impossible frameworks for discussion of a full range of practicable solutions that might be available to any particular dispute, particularly solutions that will deliver water.

There is a need for additional Federal legislation that will create a process as well as some institutional arrangements that will facilitate the development of water management solutions to Indian water rights disputes. Such legislation would have to provide for technical assistance, water project planning, and engineering, water rights adjudication, and project financing. However, the mix of these components as they are applied to any one problem should be flexible enough that some creativity can be exercised in shaping a solution to individuals, individual suits.

I don't think legislation would be successful if it would impose or require mandatory adjudication or try to apply a uniform solution on every water dispute.

It is important, though, that there be a unified system for parties to work through to solve disputes, utilizing but not limited to adjudication or litigation as well as project planning, financing, and negotiation. With such processes being available, parties to a dispute will have to exhaust these administrative procedures before seeking special congressional authorization.

I am convinced that there needs to be an administrative process for dealing with water management disputes in order to bring about creative solutions. As long as one party or the other feels that litigation is the way to win their case or that a unique congressional act will deliver a solution, parties to a dispute will never come together to reconcile their differences and agree to a reasonable, practicable, implementable solution.

Ultimately we are talking about negotiation of disputes. It is my feeling that negotiations can be fruitful if there is hope that fairly negotiated settlements will be supported by Federal agencies and judiciously presented to Congress if and when negotiations should be considered a vital part of any adjudicatory or planning process. However, negotiation has little value if there is no prospect that either party will have the resources necessary to follow through with development of the water resources needed to satisfy either party's interest. That is why a more formal Federal process is needed now.

In conclusion, we must recognize that if we continue to argue the merits of State and Federal or Indian nation philosophies, we will not produce any new water to fight about. It will not be possible to settle disputes until we come together, set aside the larger philosophical differences and work on solutions that will in fact result in water projects needed to satisfy agreed interests or mitigate the losses to either party in the dispute.

Thank you very much.

Mr. MUYS. Thanks, John, for your views on the approaches to the problem.

Finally, for the non-Indian community users, let's turn to Jim Bush.

STATEMENT OF JAMES M. BUSH, MEMBER, INDIAN RESERVED WATER RIGHTS COMMITTEE, WESTERN REGIONAL COUNCIL

Mr. BUSH. Thank you, Mr. Moderator. Being the 42d speaker at the end of a long day, I am not sure that anybody is really interested in what you have to say or that you can add too much constructive information to ground that has been plowed and replowed.

Since, however, that the Western Regional Council was probably the instrumental organization in having this workshop even take place, I will take the time to talk a little bit about what they feel about it.

Several Indian leaders, Mr. Wright I believe the last, said that with respect to proposed solutions, No. 1, was the development of projects and presumably for the economic development of Indian lands and enhancement of Indian economies.

This very same interest over 50 years ago was what caused the State of Arizona to try to get enacted the legislation that would bring water from the mainstream of the Colorado in central Arizona. Arizona was unsuccessful for many years, the argument being that they didn't know how much water that Arizona really had coming to it out of the mainstream of the Colorado, and there has been much discussion today about Arizona versus California, and let's go back to it for a moment and consider it not in the light of the allocations that were made to the mainstream along the Colorado, but in 1963 Arizona, the State, was awarded 2.8 million acre-feet of water out of the mainstream in its dispute with California. That was in 1963. Twenty years later there is still no water flowing into central Arizona.

The Indians are not the only ones that have to be concerned about not getting wet water. Now here Arizona had a gold plated, blue ribbon judicial decree from the highest court in the land saying you can get 2.8 million acre-feet of water. Subsequent to that, many years after fighting in the halls of this building, Arizona was finally successful in getting passed legislation to give it the Central Arizona project.

Now that legislation didn't come easy. In order to get it, Arizona had to negotiate and somebody said that means I have got to get something that you want or I have got to give up something that you want. You're right. You're right, and what Arizona had to get from California was California's vote in this Senate and their vote in the House of Representatives, and the vote that the State of California controlled among other States to get that project passed. That was the negotiation, and Arizona had to give up something. They had to give up the right to use any of the 1.2 million acre-feet of water that they are entitled to under the Central Arizona project in water short years before California gives up anything.

That is the deal that was made. In other words, California exacted a tough commitment. That was necessary. Each year since then there has been a continued fight in the halls of Congress to get the money to complete that project, just like the Papaco and the Oachin project.

The name of the game that we are talking about is money, and there is no State that has the political power to get it. There is no Indian tribe that has the political power to get it. All the tribes together don't have the political power to get it. Three or four or five or eight of the States don't have the political power to get it. It takes a coalition to get it, and that is the proposed solution of the Western Regional Council.

Let me go back to *Arizona* v. *California* and the Central Arizona project. In 1977, President Carter put a number of water projects on the hit list, said we are not going to appropriate any more water. People in the Midwest and Northeast could care less about funding water projects in the West, whether Indian or non-Indian. They are not going to vote for it, so he cut off a lot of them, and the Central Arizona project was on the hit list, and it would have been continued on the hit list had it not been for the cooperation of the Indian tribes in Arizona as well as the non-Indians who also didn't get along together joining together, coming here, and fortunately having a very influential chairman of the House Interior and Insular Affairs Committee, Morris Udall, and as a result of that, it was taken off of the hit list and put back on track.

Now in 1987, the first water is supposed to flow into central Arizona under that project, not until 1997 into Tucson, but there is no certainty that the water will get there because each year there is the fight for appropriations and there is a lesson to be learned from this I think in the context of what we are talking about today. It is not hard to defeat something in this institution we are sitting in today. It is not hard to defeat it in the State legislature. Those who have been involved in legislation or lobbying know it is fairly easy to defeat something.

It is damned tough to pass anything. Now what we are talking about is getting money that will fund negotiated settlements. There is a good illustration of what can happen if people work that way, and it is represented by this piece of legislation called H.R. 5118. It is the Papaco settlement for southern Arizona. Now here is an area talked about today—water shortage. There simply isn't enough water to go around.

The settlement that the Papacos took, and I don't say they were totally satisfied with it—nobody was—gave them out of the mainstream of the Colorado some 37,000 acre-feet. That was their allocation of Colorado River water. Now they have 70,000 acres. That is less than, that is about half an acre foot. You compare that to what the Fort Mojaves got. They got 3.29 or 122,640 acre-feet for 38,000 acres. The Papacos accepted, as I said, a half an acre. In addition, they were allocated—if they had insisted on their Winters rights, said we are going to litigate, they were entitled to 226,000 acre-feet. The city of Tucson with a population of 500,000 are only getting 155,000 feet out of the Colorado.

Now what the Papacos got was a commitment for a total of 76,000 acre-feet of water, 37,000 out of the mainstream, 28,200 of reclaimed water furnished by the city of Tucson, 10,000 acre-feet for the reservation of ground water pumping, plus domestic and stock watering wells of 35 gallons a minute, plus $96 million between 1983 and 1987 to build a distribution facility, $50 million for providing the reclaimed water, and a liability funded by the Federal Government of $3.3 million annually if they don't produce and deliver the water each year; in addition to that, a $15 million trust fund contributed to by the State, by private interests and the Federal Government,

Now in addition to that, they got, which many Indian Tribes don't know whether they have yet today under Winters, they have this, the Papaco tribe shall have the right to devote all water supplies under this act, whether delivered by the Secretary or State to any use, including but not limited to agriculture, municipal, industrial, commercial, mining, and recreational, whether within or outside the reservation, so long as it is used within the Tucson active management area.

Now the State of Arizona got something out if it also. They got this commitment. In order to get that water, the Papaco Tribe has to agree to this—it will establish a water management plan for the reservation which is to be consistent with the provisions of this act. That means the ground water pumping will have the same effect as any management plan developed under Arizona law.

Now there was something here for everybody because they realized there isn't any way they can get that much water. There isn't that much water you have already heard about to satisfy Winters claims on a practicably irrigable acreage basis, but they got the commitment for an amount of water that was reasonable under the circumstances. They have the commitment of the money for the water project. The State got an agreement which was going to require a management plan.

Now we can, as has been said, sit around here and berate the people and talk about the injustices of the past, and that is simply habit forming and unproductive. The Western Regional Council has strongly supported trying to create an environment which will produce negotiated solutions. I can understand why any tribal leader, advocate or lawyer, will not agree to put a number on the water unless they get a commitment for some money to use that water with, and it is my message I guess that there is only one way that that can be accomplished, and there is no certainty about that given the enormous deficit in the budget and the commitment that people have for funding in this institution, but if 14 Governors of the Western States, the 14 public leaders, elected officials of those States, along with the tribal governments located in those States, along with the private sector—the Western Regional Council represents some 50 companies, but if there can be formed an effective political coalition dedicated to requiring the Federal Government to fulfill the commitment that it ought to make, then there is some possibility of getting that kind of funding.

It is not easy, never easy, and putting that coalition together will be enormously difficult. It will require some creativity and part of that creativity is going to have to produce some sort of that funding, and there may be sources. Increasing the cost of Federal power from reclamation projects may be one.

We have been here a long time and I will end. There are other things I want to say, but in conclusion, Mr. Moderator, I believe, as you stated earlier, that the real root of the problem here of these disputes, these 50 lawsuits, lies with the Federal Government. They created the reservations. They didn't reserve any water. They caused expansion of the West through congressional enactment under the Homestead Act, the Reclamation Act, mining laws, all of those things, sent the U.S. calvary out there to protect the settlers, providing U.S. marshals, gave the railroads free land to provide transportation, failed to protect the Indian interests. Now somebody wants to say it is a Western problem. The state ought to fund it. They ought to take care of it.

The States are too big. It isn't going to happen that way. If Western political leaders of 14 States and all the tribes and the private sector come here with one goal— you make the commitment here to take care of this problem—I will guarantee both Mr. Mondale and Mr. Reagan will spend more time in the West next November.

Thank you very much.

[The prepared statement of Mr. Bush follows:]

STATEMENT OF JAMES M. BUSH
MEMBER INDIAN RESERVED WATER RIGHTS COMMITTEE
WESTERN REGIONAL COUNCIL

BEFORE INDIAN RESERVED WATER RIGHTS WORKSHOP
OF
THE SUBCOMMITTEE OF PUBLIC LANDS AND RESERVED WATER
OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
WASHINGTON, D.C.

JUNE 19, 1984

STATEMENT OF JAMES BUSH

MR. CHAIRMAN, MY NAME IS JAMES BUSH. I AM A RESIDENT OF PHOENIX, ARIZONA AND A MEMBER OF THE INDIAN RESERVED WATER RIGHTS COMMITTEE OF THE WESTERN REGIONAL COUNCIL.

IN DISCUSSING "PROPOSED SOLUTIONS" TO THE PROBLEM CREATED BY INDIAN WATER CLAIMS, SOME PERSPECTIVE REGARDING THE SCOPE OF THE PROBLEM IS ESSENTIAL.

HOW DID IT ARISE? WHO IS RESPONSIBLE FOR IT? WHO SHOULD BEAR THE BURDEN OR COST OF A SOLUTION?

YOU HAVE ALREADY HEARD A GOOD DEAL ABOUT THE ORIGIN OF INDIAN RESERVED WATER RIGHTS -- A RIGHT CREATED BY A "LEGAL FICTION", SINCE NEITHER CONGRESS NOR THE EXECUTIVE BRANCH EXPRESSLY RESERVED WATER RIGHTS FOR INDIAN TRIBES AT THE TIME RESERVATIONS WERE CREATED OR AT ANY TIME THEREAFTER.

THE DEVELOPMENT OF THE WEST AS MR. SHRAGO POINTED OUT WAS ENCOURAGED AND MADE POSSIBLE BY SUCH CONGRESSIONAL ENACTMENTS AS:

THE HOMESTEAD ACT OF 1862
THE MINING LAW OF 1866 AND 1872
THE DESERT LAND ACT OF 1877, AND LATER
THE RECLAMATION ACT OF 1902.

AT THE OUTSET, I WISH TO EMPHASIZE STRONGLY ONE POINT WHICH I BELIEVE IS ABSOLUTELY ESSENTIAL FOR ANY RESOLUTION OF THIS PROBLEM. AND THAT IS -- A RECOGNITION THAT IT IS A NATIONAL PROBLEM AND REQUIRES A NATIONAL COMMITMENT TO SOLVE IT.

THE PROBLEM AND THE LAWSUITS EXIST BECAUSE OF THE INEXCUSABLE DERELICTION ON THE PART OF THE UNITED STATES CONGRESS FOR MORE THAN 75 YEARS -- TO COME TO GRIPS WITH THE ISSUE AND RESOLVE IT.

THE UNITED STATES HAS AN OBLIGATION TO ALL CITIZENS -- NON-INDIANS AND INDIANS ALIKE -- TO QUANTIFY INDIAN RESERVED WATER RIGHTS IN AN EQUITABLE MANNER -- AND THEREBY PROVIDE THE CERTAINTY THAT IS REQUIRED FOR FUTURE PLANNING AND ECONOMIC DEVELOPMENT. IT HAS AN OBLIGATION TO PROVIDE INDIAN TRIBES WITH THE MEANS TO MAKE ECONOMIC AND BENEFICIAL USE OF "QUANTIFIED" WATER. FINALLY, TO HELP PROVIDE A FUTURE ASSURED WATER SUPPLY, IT HAS AN OBLIGATION TO INSURE A SYSTEM OF WATER MANAGEMENT ON INDIAN RESERVATIONS THAT IS CONSISTENT WITH THE LAW OF THE STATE IN WHICH THE RESERVATION IS LOCATED.

IF SUCH A NATIONAL COMMITMENT IS NOT MADE THEN IT IS LIKELY THAT INEFFICIENT LITIGATION ULTIMATELY WILL TIE UP WATER USES AND RESOURCE DEVELOPMENT IN THIS COUNTRY WELL BEYOND THE END OF THE NEXT CENTURY -- TO THE DETRIMENT OF BOTH INDIANS AND NON-INDIANS.

Many informed authorities on this subject -- academicians, members of Congress, state officials and private citizens -- both Indians and non-Indians -- recognize that "litigation" is the worst alternative for resolving this problem. It is too expensive and time consuming. There are too many separate issues for the whole problem to be resolved by the courts in a timely fashion. For example:

1. Does the Winters Doctrine apply to groundwater?
2. Can the water be used off the reservation? By whom and for what purpose?
3. Can the right to its use be temporarily conveyed?
4. Does the primary-secondary purpose test adopted by the U.S. Supreme Court in U.S. v. New Mexico, 483 U.S. 696 (1978) apply to Indian reservations? If so, how will it be applied?
5. Is water reserved under Winters only for agricultural use? What cost benefit concepts if any should be applied?
6. Does Winters extend to quality as well as quantity?
7. Who has right to manage the water?

These are only some of the substantive questions -- in addition to a horde of procedural questions that can be anticipated as the parties struggle through each phase of the litigation.

THIS IS NOT TO SAY THAT SOME FACTUAL ISSUES MAY NOT REQUIRE ADJUDICATION. CLEARLY, THE COURT SYSTEM IS THE BEST FORUM FOR TAKING EVIDENCE REGARDING THE TIME AND AMOUNTS OF WATER USED FOR PURPOSES OF DETERMINING PRIORITIES. THE CRITICAL AND MOST CONTROVERSIAL QUESTIONS, HOWEVER, ARE QUESTONS OF LAW -- LAW WHICH REQUIRES A STATUTORY BASE BUT WHICH HAS YET TO BE ENACTED.

SO, WE ARE ULTIMATELY FACED WITH THE UNFORTUNATE PROSPECT OF HAVING NINE NON-ELECTED PERSONS ENGAGING IN WHAT AMOUNTS TO A "LEGISLATIVE PROCESS" BY TELLING US JUST WHAT IT WAS THAT CONGRESS OR THE EXECUTIVE BRANCH REALLY DID NOT DO BUT "IMPLIEDLY" INTENDED TO DO WHEN RESERVATIONS WERE CREATED.

ISN'T IT NOW TIME -- AFTER 75 YEARS -- FOR THE CONGRESS TO FULFILL ITS RESPONSIBILITY AND PROVIDE THOSE ANSWERS?

AS MR. COX POINTED OUT IN HIS EARLIER STATEMENT -- THE LAST TWO PRESIDENTS HAVE EXPRESSED A PREFERENCE FOR NEGOTIATED SETTLEMENTS AS AN ALTERNATIVE TO LITIGATION. THE WESTERN REGIONAL COUNCIL HAS BEEN ACTIVE IN SUPPORT OF SUCH A PROGRAM.

THE 1982 SETTLEMENT OF THE PAPAGO WATER CLAIMS WAS A CLASSIC MODEL OF A COMBINED NEGOTIATED AND LEGISLATIVE SOLUTION TO THIS PROBLEM. FOR THE PEOPLE DIRECTLY CONCERNED, IT PROVIDED NECESSARY ANSWERS TO SOME OF THE SUBSTANTIVE QUESTIONS I ALLUDED TO EARLIER.

In the first place, it recognized there was not enough water to meet the "irrigable acres" test laid down by the Supreme Court in Arizona v. California. The amount ultimtely agreed upon was far below the amount the Supreme Court awarded to the five tribes along the Colorado. In effect, the "settlement" was a form of "equitable apportionment".

Second: It provided that the water allocated to the Papagos could be used for any purpose and could be temporarily leased or conveyed for use "off" the reservation -- as long as the transportation off the reservation did not violate Arizona's Groundwater Management Act.

Third: It recognized Arizona's Groundwater Management Act, and made the observance of that Act upon the reservation by the Secretary a condition of the settlement.

Fourth: It provided for the funding of water distribution facilities by the federal government and imposed liability upon the Federal government for failing to deliver the required water.

Fifth: It established a $15 million trust fund for the benefit of the tribe with required contributions coming from the federal and state governments and private sources.

Mr. Ralph Cox has already identified some of the problems to be anticipated in achieving negotiated settlements.

THERE ARE TWO THAT I WOULD ESPECIALLY LIKE TO EMPHASIZE. THE FIRST HAS TO DO WITH "FUNDING" SETTLEMENTS. THE STAKES ARE LARGE IN THESE DISPUTES, AND SETTLEMENTS WILL NOT OCCUR UNLESS THERE IS A SIGNIFICANT FEDERAL INVOLVEMENT AND FINANCIAL CONTRIBUTION. THE ENORMOUS DEMANDS UPON FEDERAL RESOURCES ARE WELL KNOWN BUT ONE SHOULD NOT FORGET THE SERIOUS CONSEQUENCES THAT ARE CERTAIN TO OCCUR IF THESE DISPUTES ARE NOT RESOLVED.

THE SECOND HAS TO DO WITH WHETHER A PARTY SHOULD BE PERMITTED TO REFUSE TO PARTICIPATE IN A NEGOTIATION PROCESS AND SEEK A LITIGATED SOLUTION. IN SUCH SITUATIONS CONGRESS SHOULD PROVIDE THE MACHINERY FOR A LEGISLATIVE SOLUTION.

MR. PAUL BLOOM, A WATER LAWYER, AND MEMBER OF THE BAR IN NEW MEXICO AND WASHINGTON, D.C. SUGGESTED A LEGISLATIVE SOLUTION LAST YEAR AT A "COLORADO RIVER WORKING SYMPOSIUM" SPONSORED BY THE CENTER FOR NATURAL RESOURCES IN SANTA FE, NEW MEXICO.

MR. BLOOM'S PROPOSAL CALLED FOR THE ESTABLISHMENT OF A "PRIORITY LIST" OF STREAMS WHERE A FAILURE TO AGREE ON FEDERAL AND STATE ISSUES COULD PREVENT NECESSARY PLANNING AND DEVELOPMENT. HIS PROPOSAL WOULD IMPOSE DEADLINES FOR QUANTIFICATION AND ACCEPTANCE OF OFFERS TO NEGOTIATE, FAILING IN WHICH, CONGRESS WOULD LEGISLATE A SOLUTION.

In his remarks, Mr. Cox referred to the 1978 Report To The Congress by the Comptroller General supporting a legislative solution. The Report contained the following recommendation to Congress:

> If adequate progress is not being made because of the difficulties in resolving the controversial questions and issues discussed in this report, we hope that the Congress will consider a legislative solution."

The Council believes there are instances where "adequate progress" has not been made and may not be made in the future.

If this indeed is the case, then the Western Regional Council would propose a legislative solution. The WRC proposal is set forth in a draft entitled: Indian Water Rights Act. In summary it provides for the following:

First: The establishment of an Indian Water Rights Review Commission to be composed of seven members appointed by the President, the Chairman of the Senate Committee on Energy and Natural Resources and the Chairman of the House Committee on Interior and Insular Affairs.

The Commission would be required to investigate and analyze all data pertinent to the claims of Indians and Indian tribes and to make recommendations to Congress for the precise quantification of Indian Reserved Water Rights. Actual quantification would be by act of Congress unless prior to the effective date of any such enactment, an Indian water right had been precisely quantified by a final judicial decree or established through negotiation.

Second: Following quantification, it would provide a basis for enforcing a uniform system of administration and water management on both Indian and non-Indian lands;

Third: It would provide the means for compensating both Indian and non-Indians if their respective water rights become unexercisable as a result of congressional quantification, and if the Constitution requires payment; and

Fourth: It would establish an Indian Water Projects Commission and Fund to approve and finance Indian water projects.

HOPEFULLY, AN UNDERSTANDING OF THE MAGNITUDE OF THIS PROBLEM, A RECOGNITION OF THE INJUSTICES THAT HAVE OCCURRED FOR INDIAN TRIBES, AND THE REALIZATION THAT IN MANY CASES IT WILL BE NECESSARY TO SHARE A SCARCE RESOURCE -- TOGETHER WILL LEAD TO THE KIND OF NEGOTIATED SOLUTION THAT IS EMBODIED IN THE PAPAGO SETTLEMENT.

IN THOSE SITUATIONS WHERE THERE IS AN ARBITRARY REFUSAL TO NEGOTIATE CONGRESS SHOULD PROVIDE A LEGISLATIVE SOLUTION.

Mr. MUYS. Thank you, Jim. Before we return to the audience, Mr. Co-Moderator, do you have anything additional to add to the discussion?

Mr. TRUDELL. I will wait until we turn to the audience.

Mr. MUYS. Fine. Any comments or questions from the floor on any of the possible solutions that have been suggested this afternoon or viewpoints generally?

Any comments or questions from the audience?

Ms. NELSON. My name is Patricia Nelson. I am from the Palabank Mission. I am a member of the San Luis Rey Water Committee. These comments are for you, Mr. Bush.

I live on one of the reservations that Mr. Savilla talked about earlier in southern California that is surrounded by citrus, golf courses, and luxury homes.

I have none of that on my reservation. As a matter of fact, to tell you the truth, I water my lawn at night because I don't want anyone to know. They will tell me to quit if they see.

I want you to understand that water case means more to me and my group than wet water. This water means a chance for us to succeed and be successful beyond what we are now.

Compromise—no. Litigation—that's what I'm for. Compromise, I have given away everything I have. There isn't anything more. I will go to the mat on this one because this is the last thing that we have that you want, and I think that for the last 40 years, the southern California Indians have, we have been compromising. We have been doing it so that the cities of Escondido and Vista, the two largest and fastest growing cities in north San Diego County, can grow and thrive.

No, I don't want to compromise anymore. I want to litigate.

Mr. MUYS. Anyone else? Not much doubt about your position. Any other comments or questions? I know it has been a long day.

Well, Dick. We have got to wrap this up somehow. The Senator didn't give us any marching orders.

Mr. TRUDELL. I think in terms of just trying to think through what has been said in this whole exercise and where it leads, I am just kind of at a loss. I think that the framework, I think a lot of people would like to see emerge before that can happen—there are, I think, a lot of concerns about a number of attitudes having to change because I think the discussions have been like a rollercoaster ride, and I think that the people who have participated in terms of tribal leadership just barely scratches the surface. I think that tribal leaders have to be invited to participate in a number of exercises that private industry goes through in terms of wanting to have access to tribal resources. I think to break the habit that they have grown accustomed to in terms of having an easy ride in a number of areas, but I think for some kind of sensible, well thought-out framework for discussing or trying to develop policy in this area, it is going to really have to start on a regional basis first before it goes anyplace because I think everyone here has pointed out the diversity that exists, The concerns, the philosophies are very different.

I think that the fear that the tribes have is that unlike States, if something does happen in the country, it affects all of the Indian country as opposed to just one region, so I think that is a basis for some of the concern regarding the two settlements that have come out of this all, and are they going to really do what they say they are going to do?

But anyway, I think it is up to the tribal leaders to decide if this is a fresh beginning, a new beginning, or the direction that they choose to take, and as I mentioned, I think it is probably going to have to be done on a regional basis.

Mr. MUYS. All right. I think the Senator wanted to get a process started which will be, at least this forum, to hear the views of the Indian and the non-Indian community and the views of Federal and State agencies involved. I am not sure where Senator Wallop will go from here, but I certainly think this isn't the end of this process.

Listening to all of this, I am reminded there was a similar situation some 20 years ago with respect to Federal land problems. Generally, environmentalists were fighting developers and the States were fighting the Federal Government over jurisdiction, and Congress created a Public Land Law Review Commission. It had Senators on it, Congressmen, public appointees appointed by the President, and they went out for 4 years and looked at the Federal land problems and submitted a report to the Congress and the President in 1970, and almost all of those recommendations have been implemented. It just occurs to me that it might be a useful starting point to consider appointing something like the Indian Water Rights Commission on which there would be representatives of the Indian community and the States, Federal Government, private water users, and get out in the field, get out to Yakima, get out in the West where the problems are. Hear the people, and put a fairly short time fuze on having that commission report back, maybe a year and a half or so, and have it give its views to the Congress and the President.

I think this Congress, as we all know, doesn't have the time to really focus on these issues. Look at the drain on Senator Wallop's time. He has got to preside over important Finance Committee matters today. It is almost a task beyond the physical ability of Senators and Congressmen to deal with.

If you can get an independent commission that has the time and funding to get the kind of views we are getting today but out in the field and come back with some kind if not a consensus recommendation as to what ought to be done, at least well articulated, supported viewpoints from all the affected interests, it seems to me it would move the whole problem down the road toward a possible solution, but I have no idea what Senator Wallop has in mind.

I think it has been a useful day. I think you have been much more involved than I, Dick. It seems to me it has been a very productive day and many long hours of good comments and give and take, and I think it will be the start of something constructive. Time will tell.

I guess we just both thank you for your participation, and Terri, anything from the staff?

Ms. SNEIDER. Just thank you, everyone, for coming and participating and making this a good day.

Mr. MUYS. Thank you again.

[Whereupon, at 5:12 p.m., the workshop was concluded.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

INDIAN WATER RIGHTS IN THE WEST

A Study Prepared for the
Western Governors' Association
by
The Western States Water Council

May 1984

In 1982 the Western Governors' Policy Office began a program of analysis covering several facets of western water. Since its founding in February of 1984, the Western Governors' Association has continued that work. From time to time the Association publishes reports that it believes will contribute to the public debate on water issues. The Association will also occasionally publish background papers that have been produced in support of the policy analysis. This volume is one of two background papers prepared by staff of the Western States Water Council under contract to the Western Governors' Association. Funding was provided by an unrestricted gift to the Institute for Policy Research.

WGA is an independent, non-partisan organization of sixteen western states, one Pacific commonwealth, and two territories.
Established in 1984, as a result of the merger between the Western Governors' Policy Office (WESTPO) and the Western Governors' Conference (WGC), its purpose is to strengthen the policymaking and management capacity of member states and their role in the federal system.
It serves the interest of the governors across a range of functional concerns, including energy, agriculture, water, natural resources, international trade, fiscal policy, economic development, and related issues.

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Footnotes

INTRODUCTION

The following is an investigative study undertaken at the request of the Western Governors' Policy Office* dealing with the subject of Indian water rights in the Western United States. It has been compiled by the staff of the Western States Water Council and does not necessarily represent the individual views of Council members or the collective view of the Council as a whole.

The study does not purport to be an exhaustive report on the general topic of Indian water rights. Its specific focus is the potential quantity of such rights and the issues related immediately thereto.

The aim of the study is description as opposed to persuasion or advocacy. Because of the generally uncertain nature of the subject matter, few definitive conclusions are reached. Nothing in the study should be taken as a statement of what any tribe's water rights "ought" to be, nor as an endorsement of any formula for quantification or method of settling Indian water right claims.

The study begins with a look at the availability of water in the West and the legal system used to create and administer rights to that water. It then discusses Indian water right issues, focusing specifically on the potential quantity of Indian water claims. A review of the methods which have been used to attempt to quantify Indian water rights concludes the study.

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*The Western Governors' Policy Office is a predecessor organization of the Western Governors' Association.

I. Water in the West

A brief description of the water supply picture in the western United States is necessary to give perspective to the question of the quantification of Indian water rights.

Water is a scarce resource in the arid West. Early American cartographers often referred to the region as the "Great American Desert." Even including the water-rich areas of the coastal states, states west of the 100th meridian receive only about one-fourth of the rainfall which occurs in the East. 1/ Yet 1975 per capita consumption in the West was 12.4 times that in the East. 2/

The amount of water available for use in the West is finite. Some methods of augmentation, such as weather modification and desalinization, have added slightly to available water, while others, such as importation of icebergs and massive interbasin transfer plans, offer theoretical but problematic possibilities for further increase. Also, the western states are implementing conservation measures to better use available water resources. Still, absent some as yet undiscovered innovation in water development technology, western water supplies will remain a limiting resource.

For various reasons it is difficult to define precisely the relationship between water supply and water use in the West. These reasons include the varying factors of timing and location of available water, water quality fluctuations, and "third-party" effects such as maintenance of non-consumed return flows and priority of rights.

Notwithstanding these difficulties, the following table gives an idea of the water supply/water use relationship in the western states. The table's definition of "water use" includes both instream needs and off-stream consumption. Instream needs are defined as the minimum flow necessary for maintenance of fish and wildlife populations or for navigation. Off-stream consumption is estimated as the total water that would have been consumed or lost assuming a demand based on 1975 levels of activity. Although there is an absence of consensus as to the amount of water which should be allocated to instream uses, this does not mean that including them overstates the degree of water scarcity in the West. Recently increasing concern with instream values probably indicates that future water use for maintenance of such values will not dimish and may increase.

The "average" column in the table is based on precipitation levels that will be equaled or exceeded 50% of the time while the "dry" column is based on levels which will be equaled or exceeded 80% of the time. It should be noted that demands and diversions for off-stream water consumption as well as maintenance of instream flows have increased since 1975.

ILLUSTRATION I

Total Water Use as a Percentage of Streamflow in Average and Dry Years

Region number	Subregion number	Name	Average years	Dry year
09		**SOURIS-RED-RAINY**	62	110
	01	Souris-Red-Rainy	62	110
10		**MISSOURI**	87	120
	01	Missouri-Milk-Saskatchewan	82	105
	02	Missouri-Marias	82	104
	03	Missouri-Musselshell	81	102
	04	Yellowstone	96	117
	05	Western Dakotas	84	108
	06	Eastern Dakotas	82	102
	07	North and South Platte	140	160
	08	Niobrara-Platte-Loup	103	122
	09	Middle Missouri	91	107
	10	Kansas	123	191
	11	Lower Missouri	87	120
11		**ARKANSAS-WHITE-RED**	83	138
	01	Upper White	84	126
	02	Upper Arkansas	134	175
	03	Arkansas-Cimarron	114	263
	04	Lower Arkansas	83	152
	05	Canadian	122	261
	06	Red-Washita	129	180
	07	Red-Sulphur	83	133
12		**TEXAS-GULF**	101	197
	01	Sabine-Neches	85	163
	02	Trinity-Galveston Bay	89	176
	03	Brazos	142	327
	04	Colorado (Texas)	119	198
	05	Nueces-Texas Coastal	96	183
13		**RIO GRANDE**	136	180
	01	Rio Grande Headwaters	110	159
	02	Middle Rio Grande	140	165
	03	Rio Grande-Pecos	148	176
	04	Upper Pecos	144	177
	05	Lower Rio Grande	136	180

ILLUSTRATION I (Cont.)

Total Water Use as a Percentage of Streamflow in Average and Dry Years

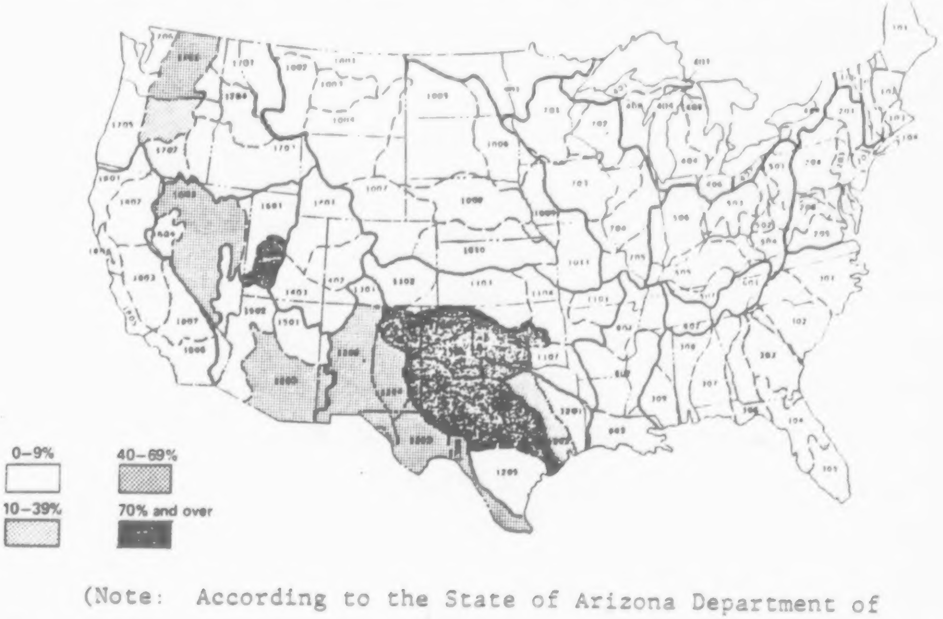
Region number	Subregion number	Name	Average years	Dry year
14		UPPER COLORADO	84	112
	01	Green-White-Yampa	87	114
	02	Colorado-Gunnison	80	106
	03	Colorado-San Juan	94	112
15		LOWER COLORADO	225	239
	01	Little Colorado	90	103
	02	Lower Colorado Main Stem	225	239
	03	Gila	304	315
16		GREAT BASIN	125	158
	01	Bear-Great Salt Lake	102	125
	02	Sevier Lake	186	204
	03	Humboldt-Tonopah Desert	177	222
	04	Central Lahontan	116	165
17		PACIFIC NORTHWEST	84	102
	01	Clark Fork-Kootenai	62	73
	02	Upper / Middle Columbia	79	94
	03	Upper / Central Snake	91	119
	04	Lower Snake	78	96
	05	Coast-Lower Columbia	85	102
	06	Puget Sound	81	96
	07	Oregon Closed Basin	101	161
18		CALIFORNIA	82	113
	01	Klamath-North Coastal	65	95
	02	Sacramento-Lahontan	76	106
	03	San Joaquin-Tulare	109	131
	04	San Francisco Bay	91	152
	05	Central California Coast	93	169
	06	Southern California	107	118
	07	Lahontan-South	243	290

Source: U.S. Water Resources Council, The Nation's Water Resources: The Second National Water Assessment, Vol. 3, app. II (Washington, D.C., GPO 1978) Tables II-5 and II-6, app. IV, Table IV 2.

With the exception of a portion of North Dakota (Souris-Red-Rainy River Basins sub-region) the average water use as a percentage of stream flow exceeded 80% in all of the western United States in 1975. In approximately half of the area water use exceeded stream flow in an average year of precipitation. In virtually the entire area stream flow is exceeded by water use in a dry year. In areas where water use exceeds stream flow ground water supplies must be used to supplement surface flows. In many cases, ground water "mining" occurs. In these situations ground water extraction exceeds natural replenishment. Many areas are currently experiencing the various difficulties associated with serious ground water over-draft. The following illustration shows where this problem is most accute. It is also based on 1975 levels of withdrawal.

ILLUSTRATION II

THE PERCENTAGE OF GROUNDWATER WITHDRAWN THAT IS IN EXCESS OF NATURAL RECHARGE RATES 1975



(Note: According to the State of Arizona Department of Water Resources the sub-region in the southeastern part of that state should be shaded black.)

Source: U.S. Water Resources Council, 1975 National Water Assessment, Draft Final Report (Washington, D.C., 1975)

Although the scarce and static supply of water in the West is already heavily used, numerous demands for additional use are constantly being made. Population growth with its concomitant municipal, industrial, and food and fiber requirements account for many of these demands. Also pressing is the emphasis being placed on the need to develop the energy related natural resources in the western United States. As a rule, such development is water-intensive, thus serving to pose tremendous additional burdens on the already water-short West.

II. Western Water Law

The early miners in the West often needed water for mining operations which were located far from natural water sources. They built diversionary structures and water transport devices and thereby established use of water supplies. Their "first in time, first in right" use of water was looked upon with the same validity as their "first in time, first in right" establishment of mining claims. The doctrine of prior appropriation grew from this tradition.

The growth and development of the appropriation doctrine received the support and approval of the federal government.

By passage of the Mining Act in 1866 [3] and the Desert Land Act in 1877 [4] Congress approved past and future appropriations of water on public lands which had been made pursuant to local laws and customs. This included the vast majority of appropriations since most western land was in public ownership at the time.

The Desert Land Act stated that all water on public lands was "free for appropriation and use of the public for irrigation, mining and manufacturing purposes." The Supreme Court later recognized in California-Oregon Power Co., v. Beaver Portland Cement Co.[5] that this statute affected a severance of the land and water estates in the public domain, directing that rights to the land be established independently of water rights. This decision affirmed the principle that water could be appropriated and property rights in it established under traditional state practices and laws. Although a few states provided for establishment of some riparian water rights, the majority opted for the appropriation doctrine as the controlling standard of water law. That standard prevails.

The water rights created under the appropriation doctrine are considered constitutionally protected property interests. They are given a priority date by which they are integrated into a hierarchy of rights controlled by the "first in time" principle. The attributes of appropriative water rights are: (1) Their basis is publicly defined beneficial use: (2) The rights are stated in terms of a definite quantity, nature of use, and time of use; (3) The rights may be terminated by abandonment or forfeiture; (4) Their priority is the date on which beneficial use began and; (5) They are transferrable.[6/] One of the most important characteristics of the appropriation doctrine is its protection of economies based upon existing water uses. The stability afforded by the doctrine has contributed significantly to making the West an inhabitable and economically productive region.

III. Indian Water Rights Issues

In 1906, years after Congress had approved the creation of vested property interests in water under the appropriation doctrine, the United States brought suit on behalf of the Indians living on the Fort Belknap Indian Reservation in Montana alleging that all of the water of the Milk River, some of which was being used by non-Indians, was necessary for reservation purposes. The defendants in the suit held valid state water rights under Montana law and had appropriated and were beneficially using 5,000 miners' inches of Milk River water for farming and ranching purposes. They claimed they would be forced to abandon their homes and farms if deprived of that water. They stressed the validity of their state created water rights.

The resolution of the dispute between the Indians and the Milk River water users would have been a simple one if Congress had included provisions establishing Indian water rights in the legislation which created the Fort Belknap Reservation. Unfortunately such was not the case. The lack of a clearly established Indian water right led the Supreme Court in Winters v. United States [7/] to creatively fashion a "reserved" Indian water right based on the reasoning that Congress must have intended to reserve water for the Indian reservation at the time of its creation because such water was necessary to convert the "nomadic and uncivilized" Indians to "pastoral and civilized people". [8/] Thus, the Winters doctrine, or the Indian "reserved water rights" doctrine, was born.

In the seventy-five years since Winters was decided many more questions about Indian reserved rights have been asked than answered. Thus, queries abound relating to, among other things, priority dates, rights of allotees, lease and sale of rights, jurisdiction for purposes of adjudication and administration, scope and purpose of the rights, as well as their termination. Because the Winters doctrine has been judicially created and defined, answers to these questions come only sporadically (when a case presenting them arises) and then often in less than definitive fashion.

In comparison to the attributes of appropriative water rights, with which the Indian reserved rights must eventually be integrated, the following is known. The basis of Winters rights is not a publicly defined beneficial use under state law, but the implied intent of Congress. Winters rights have rarely been stated in terms of a definite quantity, nature of use or time of use. They are not terminated by abandonment or forfeiture. Their priority date is not later than the date the Indian reservation to which they pertain was created. Winters rights apparently are transferable. However certain restrictions pertain to such transfers, some of which are currently being defined through litigation. In short, there is really little similarity between Winters water rights and appropriative water rights. This lack of similarity has been a major factor in the controversy which Winters rights have engendered.

Of all the questions relating to Winters rights, possibly the one which will have the greatest impact when answered is the question relating to their potential quantity. In Winters the Court seemed more concerned with establishing the existence of the impliedly reserved Indian water right than defining the quantity of the right. The Winters decree can be read to have established a reserved water right for the Fort Belknap Reservation of 5,000, 7,000 or 11,000 miners inches from the Milk River, or all of the water in the river. [9/] Since Winters, the courts have struggled to ascertain a formula for quantifying Indian reserved rights. Today the quantity question is unanswered for most reservations.

In United States v. Walker River Irrigation District,[10] the court held that the "extent to which the use (by Indians) of a stream might be necessary could only be demonstrated by experience." Although there were 10,000 acres of land on the reservation susceptible to cultivation, the tribe had never cultivated more than 2,100 acres. The court used this amount to calculate a reserved water right with a priority date of 1859, which was when the Secretary of Interior set aside land for the reservation. Thus, according to the Walker River court, past and present use was the measure of the reserved right.

A different standard was imperfectly identified in United States v. Alexander[11] which seems to support the proposition that reserved water rights apply to all waters on an Indian reservation. The vagueness of the opinion, according to one commentator,[12] made its precedential value questionable.

In United States v. Ahtanum Irrigation Dist.,[13] the court held that the quantity of the Indian reserved right should not be measured by use at the time the reservation was created, because water should be recognized as having been reserved for future uses. Thus, "ultimate need" (based on future uses) was the standard articulated by the Ahtanum court. This result seemed to be supported by the holding in an older case, Conrad Inv. Co. v. United States.[14]

Perhaps as an attempt to accommodate past, present and future needs and, at the same time, make possible the determination of a fixed quantity, in 1963 the United States Supreme Court in Arizona v. California [15] held that the standard for quantifying Indian reserved water rights for five lower Colorado River Indian reservations was the amount of water necessary to irrigate the "practicably irrigable acreage" (PIA) on the reservations. The Court provided few guidelines regarding technological standards for irrigation, nor was much guidance given on questions of economic practicability (although the most recent decision in the case, with accompanying Special Masters Report, is more helpful in this regard). [16] But, the Court did decide upon a formula which facilitates determination of a fixed quantity for Indian reserved water rights. Nowhere in the opinion, however, did the court declare the Arizona standard as that by which a quantification would (or should) be reached for all Indian reservations. Nevertheless, Arizona is the only Supreme Court authority on the question of quantification.

Many observers believe that the Arizona practicably irrigable acreage (PIA) standard is not the "final word" on quantification of Indian water rights. Some have argued that a PIA diversionary water right of 900,000 acre feet per year to five Indian tribes with the total population of approximately 2,000 members is far too generous. This is especially true, they insist, when viewed in the light of the current Colorado

River water use in the United States, which is approximately 10,000,000 per acre feet per year. Others opine that the Supreme Court has recently placed under a cloud of uncertainty the PIA standard and noted willingness to reconsider its universal applicability. [17]

On the other hand, others have argued that the PIA standard unreasonably limits the quantification of Indian water rights to a formula based on reservation size. They stress that water rights should be quantified on the basis of other Indian needs such as municipal, domestic, stock watering, propagation and harvesting of fish, recreation and industrial purposes in addition to irrigation. Also of particular importance is water for the development of energy related resources. Many of these observers would have Indian water rights quantified only on the basis of open-ended decrees which could be modified to expand the rights as Indian needs and uses increase.

Although the law of reserved water rights requires that such rights be recognized only for the purposes for which a reservation was established [18] and limits the water right to fulfillment of those purposes and "no more," [19] proponents of the expanded view of Indian water rights argue that the purpose for which Indian reservations were reserved was to create for the members of the tribe a "tribal homeland." This definition, they insist, both acurately reflects historical reality and provides for recognition of expansive Indian water rights.

Two very recent cases shed light on the open-endedness of Winters rights. In Nevada v. United States [20] the Supreme Court held that a decree which resulted from a general adjudication could not be re-opened to enlarge Indian water rights for fishery purposes when the Indian rights were originally quantified for irrigation uses. In the most recent Arizona v. California decision [21] the Supreme Court held that while language in the Supreme Court decree which mandated continuing jurisdiction over the case allowed for changes in quantified rights because of changes in reservation size (i.e., for boundary changes), the language did not allow establishment of expanded water rights for lands within reservation boundaries which were omitted from consideration in the earlier determination of rights. Perhaps these decisions signify a flat rejection of the theory that Indian water rights were open-ended and susceptible to expansion at any time. A narrower interpretation, however, is that they were evidence of the Court's respect for earlier court decrees establishing water rights and its reluctance to upset them under most circumstances.

Three other recent cases dealing with quantification should also be mentioned. In Colville Confederated Tribes v. Walton [22] the Ninth Circuit Court of Appeals recognized the existence of an Indian water right to support a fishery and to maintain spawning grounds for a non-native species of fish In United States v. Adair [23] the Ninth Circuit established an Indian water right for hunting and fishing purposes on the terminated Klamath Indian Reservation. The scope of the right will be based on the Tribe's current hunting and fishing activities. Both the Colville reservation and the former Klamath reservation are located in the Northwest where Indian assertions of water right claims for fishery purposes are significant.

In In Re: The General Adjudication of all Rights to Use of Water in the Big Horn System and all Other Sources [24] the Wyoming district court generally accepted the Special Master's findings as to the scope and extent of practicably irrigable acreage on the Wind River reservation and decreed to the Indians' accompanying water rights. However, the Master recommended extensive instream flow rights which were rejected by the district court on the basis that the reservation was established as an agricultural reservation, not a hunting and fishing reservation. Using the same reasoning, the court also rejected a recommended award for mineral development and municipal and industrial uses.

IV. Potential Quantity of Indian Water Rights

In spite of all the litigation (and legislation and negotiation) aimed at quantifying Indian water rights, such rights have been finally determined for only a small handful of reservations. Great controversy surrounds the unquantified majority of the rights, yet it has only rarely motivated further or better attempts at quantification.

Specific estimates of Indian water rights for individual reservations have been relatively few. However, some related statistics give a feel for the enormity of the possible impact of quantification of water rights for all reservations in the West.

For example, the following chart shows the approximate amount of Indian land in each western state in relation to the size of the states themselves. The chart also shows approximate Indian populations for each state in relation to state population. For all states but two (Nebraska and North Dakota) the Indian populations are significantly smaller in relation to state populations than are reservation lands in relation to state lands.

ILLUSTRATION III

State	# of Ind. Res.[1]	State Land Area-Acres[2]	Indian Land Area-Acres[1]	State Population[3]	Indian Population[4]
Alaska	7	375,296,000	386,142*	400,481	44,944
Arizona	20	72,901,760	19,897,489	2,717,866	173,412
California	80	101,563,520	573,235	23,668,562	6,824
Colorado	2	66,718,080	755,400	2,888,834	2,144
Idaho	5	53,476,480	826,863	943,935	4,849
Montana	7	94,168,320	5,224,864	786,690	24,137
Nebraska	4	49,425,280	64,476	1,570,006	2,601
Nevada	24	70,745,600	1,154,110	799,184	4,866
New Mexico	26	77,866,240	7,408,225	1,299,968	30,125
North Dakota	6	45,225,600	851,926	652,695	16,735
Oregon	3	62,067,840	757,363	2,632,663	2,718
South Dakota	9	49,310,080	5,091,219	690,148	29,119
Utah	5	54,346,240	2,283,986	1,461,037	1,961
Washington	23	43,642,880	2,490,423	4,103,163	18,258
Wyoming	1	62,664,960	1,888,032	470,816	4,435

* Alaska natives will own substantially more land (perhaps as much as 40 million acres) when land is distributed to them under the Alaska Native Claims Settlement Act.

Sources

1. Department of Interior, "Lands Under the Jurisdiction of the Bureau of Indian Affairs as of Sept. 30, 1979" (Unpublished Report 1979) (Totals modified slightly for some states based on information provided by those states.)

2. Public Land Law Review Commission, One Third of the Nation's Land 224 (1970)

3. The Council of State Governments, The Book of the States, 1982-83, Table 3, 697 (1982)

4. Department of Commerce, Federal and State Indian Reservations and Indian Trust Areas (no date) (Population totals for each state calculated by adding reservation populations listed under each state.)

Though it has not been unanimously accepted, there has been a general assumption since the Supreme Court's decision in Arizona v. California that Indian water rights will generally be quantified using a method based on the number of PIA acres on a reservation. Obviously, such a determination is closely tied to the total amount of Indian land, which, as the chart demonstrates, is substantial.

Refinement of the PIA standard has brought to it a technical and site-specific meaning based not only on geographic land features but on economic factors as well. It remains to be seen whether this refinement means that less land is eligible for water under the standard than some observers may have previously imagined. In any event, possible water right awards based on a standard which hinges on reservation size could be immense.

As large as the PIA rights could be for certain reservations, in some areas, especially the Northwest, PIA rights might be dwarfed by rights based on other theoretical standards to, for example, protect fish resources. While fisheries do not consume water, they often require substantial minimum flows to protect fish habitat or maintain spawning grounds. For a reservation located substantially downstream on a river, this could mean preclusion of many upstream diversions.

Which standard will be applied to any given reservation is not clear. Nevertheless, a certain sense of the region-wide magnitude of potential Indian water right claims in the West can be gleaned from existing information dealing with various aspects of Indian water uses and perceived Indian water needs. That information, to the extent that the WSWC staff has been able to obtain it, is reproduced below, state by state for each Indian reservation.

While the tabulation does contain some settled Indian water rights, it does not purport to set forth estimates of what Indian water rights "ought" to be. Nor is it intended as a statement regarding how quantification should take place. Nor is it a PIA estimate for the various reservations. Rather, it is a listing of available information relating to irrigable lands on Indian reservations as well as Indian reservation "water needs" for purposes other than irrigation as perceived by the Indians themselves or their federal trustees.

The staff of the Western States Water Council specifically disclaims any implicit validation of any and all listed estimates. The process ultimately used to determine water rights for individual reservations may reasonably be expected to result in awards both larger and smaller than the listed estimates. The intent of the information below is to provide a general overview of the potential Indian water right claims in the West based on the best available information regarding such claims.

The reproduced information has been gathered from various sources. These include formal and informal state agency estimates of possible Indian water claims, published and unpublished tabulations and studies by the Bureau of Indian Affairs, the Department of Interior and other federal agencies, documents relating to litigation, negotiation and legislation of Indian water rights and "at large" literature. In gathering the information, the WSWC staff conducted extensive research itself and contacted each western state requesting information relating to Indian water claims. BIA area offices were also contacted, as was the Department of Interior in Washington, D.C.

All obtainable information was assembled and tabulated in the tables below. The first two colums in the tables list the names of the Indian land holdings and their corresponding acreages. The second two list currently irrigated Indian lands, potentially irrigable Indian lands and a calculated unit withdrawal coefficient for the listed reservations. Unless specifically noted otherwise (see notes for each reservation), none of this information purports to be a "PIA" estimate as that term has been judicially defined. Such estimates are beyond the scope of this study. Some of the estimates of "potentially irrigable lands" are higher and some lower than a PIA figure would probably be. This is because in some cases the listed estimates are of all irrigable lands on a reservation (in these cases application of the economic analysis of the PIA standard would probably make the PIA figure different) while other listed estimates include only a portion of the irrigable lands on a reservation (in these cases the PIA figure for the entire reservation might be greater). The fifth column lists potential water rights based on estimates other than those related to irrigable lands or estimates which include water for irrigable lands and other needs or uses. The sixth column lists a potential total acre-feet per year claim for the reservation, based on the figures in the other columns.

Except for reservation names and gross acreages, each entry in the tables is footnoted. Accompanying notes are located immediately following the tabulation for each state. These notes list the source of the information and, where appropriate, how the information was calculated.

Where no information was obtainable for a reservation, none is included in the tabulation below. Note that there appears to be a lack of uniformity in the relationship between the figures in the "Potential Claim" column and those in the "Presently Irrigated Acres," "Potentially Irr. Acres (Unit W/Drwl.)" and,"Other Estimate of Water Needs" columns. This is because of the differing kinds of information included below. In some instances only a potential water claim or a settled water right was found in researched literature. In other instances only a number of potentially irrigable acres was found. In these cases a unit withdrawal coefficient was calculated and the number of potentially irrigable acres was multiplied by that coefficient to arrive at the potential claim. In still other instances the only available information for a reservation was the number of presently irrigated acres. In these cases, that number was multiplied by a calculated unit withdrawal coefficient and the total was included in the "Potential Claims" column.

For some reservations information appears in each of the last four columns or in two or three of them. Where an "Other Estimate of Water Needs" figure appears, it usually includes water for irrigation purposes. It is, therefore, the total potential claim for a reservation and is included in the "Potential Claim" column whether or not other information relating to irrigable lands is included for that reservation. Where a "Potentially Irr. Acres" figure appears with a "Presently Irrigated Acres" figure, the potential claim is based on "Potentially Irr. Acres" figure. Where no unit withdrawal figure appears, the figure in the "Potential Claims" column appears as it was found in sources researched.

STATE OF ALASKA

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Anchorage Pub. Dom. Allotmts. & Townsite Lots	39,959.23				
Bethel Pub. Dom Allotments & Townsite Lots	54,863.97				
Fairbanks Pub. Dom. Allotments & Townsite Lots	4,610.09				
Inupiat Comm. Pub. Dom. Allotments & Townsite Lots	6,579.08				
Tanana Chiefs Pub. Dom. Allotments & Townsite Lots	83,477.38				
Nome Pub. Dom. Allotments & Townsite Lots	106,884.19				
Annette Island (Metlakatla)	86,741.00				
Pub. Dom. Allotments & Townsite Lots	3,027.25				
AL TOTAL 7	*386,142.19				

*plus fee land under Alaska Native Claims Settlement Act (possibly 40 million acres)

NOTES - ALASKA

Although no estimates of Indian water right claims or irrigable acreage could be found, a letter from L. A. Dutton, Chief of the Water Management and Procedures Section of the Alaska Department of Water Resources to Western States Water Council reads in part:

> In Alaska, water use for agricultural irrigation is an important but minor use of water. Indian water uses in Alaska center around subsistence use and potential conflicts include water use for development projects, particularly resource development, such as for oil and gas and locatable minerals.
>
> In general, conflicts between Indian or Native claims to water and the State of Alaska stem from conflicts of interpretation of the Alaska Native Claims Settlement Act. In general, Native groups feel that they are entitled to manage water on Native Corporation Lands while the State of Alaska holds that the Alaska Constitution and the Alaska Water Use Act, AS 46.15, vests issuance of water rights on all lands in the state; including local, state, federal, and private lands; ...

STATE OF ARIZONA

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BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
FLAGSTAFF JOINT USE ADMINISTRATIVE OFFICE					
Hopi-Navajo Joint Ownership	1,765,944.00		*See Navajo Res. below		*See Navajo Res. below
NAVAJO AREA					
Navajo Reservation	8,956,525.75	9,800[a]	*3,700,000[a] (3.00)	15,000,000[a]	*15,000,000[a]
Navajo Off-Res	7,332.57				
PHOENIX AREA					
Colorado River Agency					
Colorado River Reservation	225,995.45	77,000[a]	99,375[b] (6.67)		662,042[b]
Fort Mohave Reservation	22,820.45	10,000[a]	14,916[b] (6.46)		96,416[b]
Fort Apache Agency					
Fort Apache Reservation	1,664,972.00	1,700[a]	49,859[c] (5.38)	518,169[c]	518,169[c]
Fort Yuma Agency					
Cocopah Reservation	1,772.53	400[a]	431[b] (6.37)		2,744[b]
Fort Yuma Homesteads	480.00				
Fort Yuma Reservation	1,581.46	0[a]	0[b]		0[b]

STATE OF ARIZONA

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Hopi Agency					
Hopi Reservation	706,310.26		*See Navajo Res. Above		*See Navajo Res. Above
Kiabab-Paiute Reservation	120,413.00	70[a]	48,000[a] (3.45)		166,000[a]
Papago Agency					
Gila Bend Reservation	10,337.00	570[a]	4,500[d] (5.4)		24,300[a]
Papago Reservation	2,773,437.56	2,000[a]	2,260,000[a] (5.4)		12,200,000[a]
Papago Off-Res	20.00				
San Xavier Reservation	71,095.00	1,800[a]		60,000[e]	60,000[e]
Pima Agency					
Gila River Reservation	371,932.63	62,000[a]	266,472[f] (6.0)[b]	1,865,470[f]	1,865,470[f]
Maricopa Ak-Chin Reservation	21,840.00	6,100[a]			85,000[g]
Peoples Valley Public Domain	160.00				
Phoenix Indian School	104.25				
Salt River Agency					
Fort McDowell Reservation	24,680.00	1,200[a]	6,190[h] (5.4)	45,000[h]	45,000[h]
Salt River Reservation	49,293.30	13,000[a]	30,500[d] (5.40	191,000[a]	191,000[a]

STATE OF ARIZONA

③

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
San Carlos Agency					
San Carlos Reservation	1,826,541.00	2,300[a]	35,400[h] (6.0)	350,000[h]	350,000[h]
San Carlos Public Domain	880.00				
Truxton Cañon Agency					
Havasupai Reservation	188,077.38	270[a]	204[i] (5.49)		1,120[i]
Hualapai Reservation	992,462.95	20[a]	83[i] (4.65)		386[i]
Prescott Yavapai Reservation	1,398.60			986[h]	986[h]
Public Domain	709.64				
Camp Verde Reservation	653.10	180[a]	220[h] (5.0)	3,000[a]	3,000[h]
Yavapai-Tonto Community	85.00			510[h]	510[h]
Pasqua Yaqui	202.00		58[h]	1,200[h]	1,200[h]
AZ TOTAL 20	19,808,056.88	188,410	6,516,208	18,034,825	31,273,343

NOTES - ARIZONA

a. Estimates by Arizona. Values do not represent claims by Indian tribes.

b. Arizona v. California
Note that these numbers are based on the 1964 decision and may increase when boundaries for these reservations are finalized.

c. Claimed in 1983 lawsuit, White Mountain Apache Tribe v. James G. Watt et al, filed in U.S. District Court, District of Arizona.

d. Amount identified in S. 3298 introduced by Senator Edward Kennedy in 1976.

e. Southern Arizona Water Rights Settlement Act of 1982 (P.L. 97-293).

f. Claimed in current Gila River Adjudication.

g. Congressional Act - "Water Right Claims - Ak Chin Indian Community" (P.L. 95-328).

h. Amount claimed by Indian tribe and shown in report by U.S. Bureau of Reclamation. "Finding of No Significant Impact of CAP Indian Allocation."

NOTES - ARIZONA (Cont.)

i. Claim by United States in Arizona v. California. Claims by Indian tribes expected to exceed values.

STATE OF CALIFORNIA

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BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
PHOENIX AREA					
Colorado River Agency					
Chemehuevi Reservation	30,653.87	0[e]	1,900[a]		11,340[a]
Colorado River Reservation	42,696.00	2,000[e]	8,213[a]		54,746[a]
Fort Mojave Reservation	5,997.05	2,500[e]	2,119[a]		13,698[a]
Fort Yuma Agency					
Fort Yuma Reservation	41,979.62	7,500[e]	7,743[a]		51,616[a]
Western Nevada Agency					
Public Domain	967.88				
Sherman Indian School	83.14				
SACRAMENTO AREA					
Central California Agency					
Alturas Rancheria	20.00				
Benton Paiute Reservation	160.00				
Berry Creek Rancheria	33.04				
Big Pine Rancheria	279.00				
Bishop Reservation	875.00				

STATE OF CALIFORNIA

②

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Bridgeport Colony	40.00				
Cachil Dehe Colony	268.68				
Cedarville Rancheria	17.00				
Cold Springs Rancheria	100.65				
Cortina Rancheria	640.00				
Dry Creek Rancheria	75.00				
Enterprise Rancheria	40.00				
Fort Bidwell Reservation	3,334.97	228[b]	300[b]		990[b]
Fort Independence Reservation	352.24	81[b]	240[b]		960[b]
Grindstone Creek Rancheria	80.00				
Hopland Rancheria	17.57				
Jackson Rancheria	330.66				
Laytonville Rancheria	200.00				
Likely Rancheria	1.32				
Lone Pine Reservation	237.00	120[b]	237[b]		948[b]
Lookout Rancheria	40.00				

STATE OF CALIFORNIA

③

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Manchester Rancheria	363.09				
Middletown Rancheria	108.70				
Public Domain	11,564.14				
Robinson Rancheria	6.40				
Round Valley Reservation	19,067.87				
Rumsey Rancheria	66.51				
Santa Rosa Rancheria	170.00	0[b]	110[b]		528[b]
Sheep Ranch Rancheria	.92				
Sherwood Valley Rancheria	292.22				
Shingle Springs Rancheria	160.00				
Stewarts Point Rancheria	40.00				
Sulfer Bank Rancheria	50.00				
Susanville Reservation	150.00				
Tule River Reservation	54,116.00	10[b]	115[b]		510[b]
Tuolumne Rancheria	323.10	25[b]	50[b]		180[b]
X. L. Ranch Reservation	9,254.86				

STATE OF CALIFORNIA

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Hoopa Agency					
Yokayo Ranch	.50				
Big Bend Rancheria	40.00				
Big Lagoon Rancheria	9.26				
Hoopa Valley Reservation	86,727.88	287[b]	1457[b]		4,954[b]
Hoopa Valley Res. Extension	7,027.85				
Montgomery Creek Rancheria	72.00				
Orleans Karok	6.62				
Public Domain	6,421.15				
Resighini Reservation	228.00				
Roaring Creek Rancheria	80.00				
Trinidad Rancheria	43.68				
Palm Springs Office					
Agua Caliente Reservation	24,463.12				
Southern California Agency					
Augustine Rancheria	502.29				

STATE OF CALIFORNIA

⑤

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Barona Rancheria	5,180.66				
Cabazon Reservation	1,461.53				
Cahuilla Reservation	18,272.38				
Campo Reservation	15,010.00				
Capitan Grande Reservation	15,753.40				
Cuyapaipe Reservation	4,100.13				
Inaja Cosmit Rancheria	851.81				
Jamul Reservation	4.66				
LaJolla Reservation	8,228.06	0^{c}	1,434^{c}		5,139^{c}
LaPosta Reservation	3,672.29				
Los Coyotes Reservation	25,049.63				
Manzanita Reservation	3,599.38				
Mesa Grande Reservation	120.00				
Morongo Reservation	32,254.82	345^{b}	6,287^{b}		31,476^{b}
Pala Reservation	11,481.33	260^{c}	4,903^{c}		11,804^{c}

STATE OF CALIFORNIA

ⓘ

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Pauma-Yuima Reservation	5,877.25	25[c]	232[c]		558[c]
Pechanga Reservation	4,093.80				
Public Domain & Purchased	1,621.82				
Ramona Reservation	560.00				
Rincon Reservation	3,960.25	171[c]	3,625[c]		7,872[c]
San Manuel Reservation	653.15				
San Pasqual Reservation	1,379.58				
Santa Rosa Reservation	11,092.60				
Santa Ynez Reservation	126.63				
Santa Ysabel Reservation	15,526.78				
Soboba Reservation	5,035.68	0[b]	708[b]		3,080[b]
Sycuan Reservation	640.00				
Torres-Martinez Reservation	24,760.74				
Twenty-Nine Palms Reservation	402.13				
Viejas Rancheria	1,609.00				

STATE OF CALIFORNIA

⑦

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
ub-Total ancherias					
Miscellaneous Northern Calif. Reservations		216[d]	317[d]		1,046[d]
Miscellaneous Southern Calif. Reservations		123[d]	17,521[d]		63,223[d]
CA TOTAL 80	573,235.34	14,741	58,665		269,282

NOTES - CALIFORNIA

a. Arizona v. California

Note that these numbers may increase when boundaries for these reservations are finalized. The Chemehuevi Reservation boundary is not being challenged and the water right associated therewith is final.

Note also that the numbers contained in the "Potential Irrigable Acres" column are, in this instance, "practically irrigable acres" as that term has been judicially defined.

b. Information from unpublished tabulation entitled "Indian Irrigation Projects Presently Included in the BIA Irrigation Construction Program - October 1975," compiled by the Bureau of Indian Affairs. Copy provided to Western States Water Council by the Department of Interior's Office of Water Policy.

c. Id. Footnote 27 to the document states: "A proposed action being considered by the Federal Power Commission regarding the use of the water of the San Luis Rey River in Southern California could result in considerable expansion of irrigation facilities of the La Jolla, San Pasqual, Pauma, and Pala Reservations.

d. Id. Footnote 25 to the document states, in part, "Development of the acreage shown in the California Miscellaneous (Northern) and (Southern) are presently not feasible because of a lack of firm water supply..."

e. Estimates provided by the State of California

STATE OF COLORADO

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
ALBUQUERQUE AREA					
Southern Ute Agency					
Southern Ute Reservation	307,370.22		*93.000[a]		
Ute Mountain Ute Agency					
Ute Mountain Reservation	448,029.49		*(Number above incl. both Colo. reservations)		
	755.399.71		93,000[a]		

NOTES - COLORADO

a. Information based on maps of arable acres developed for BIA. Information provided by Colorado Water Conservation Board of Colorado.

STATE OF IDAHO

BIA Area; BIA Agency; Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
PHOENIX AREA					
Eastern Nevada Agency					
Duck Valley Reservation	145,545.00	16,250[a]	33,600[a] (3.00)[a]		100,800[b]
PORTLAND AREA					
Fort Hall Agency					
Wyandotte Allotments	240.00				
Fort Hall Reservation	522,332.45	85,940[a]	160,940[a] (3.50)[a]		563,290[b]
Northern Idaho Agency					
Coeur d'Alene Reservation	69,966.21	0[a]	28,025[a] (3.50)[a]		84,075[b]
Kootenai Reservation	2,335.78				
Nez Perce Reservation	86,443.82	39[a]	4,852[a] (3.00)[a]		14,556[b]
ID TOTAL 5	826,863.26	102,229	227,417		762,721

NOTES - IDAHO

a. Information provided by Phillip Rassier, Assistant Attorney General, State of Idaho. For more information *see* Rassier, *Indian Water Rights: A Study of the Historical and Legal Factors Affecting the Water Rights of the Indians of the State of Idaho*: Idaho Department of Water Resources Legal Affairs Report #1 (1978).

b. Calculated based on a.

STATE OF MONTANA

①

BIA Area; BIA Agency; Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
BILLINGS AREA					
Blackfeet Agency					
Blackfeet Reservation	908,349.87		450,000[f] (4.5)[f]		2,0250,000[g]
Crow Agency					
Crow Reservation	1,557,238.78			2,114,100[a]	2,114,100[a]
Flathead Agency					
Flathead Reservation	618,507.95	102,338[b]	(6.0)[c]		614,030[d]
Flathead Off-Res	723.12				
Fort Belknap Agency					
Fort Belknap Reservation	588,756.19			211,400[a]	211,400[a]
Fort Belknap Off-Res	28,731.08				
Turtle Mountain Public Domain	39,630.22				
Fort Peck Agency					
Fort Peck Reservation	919,208.54			1,050,472[e]	1,050,472[e]
Turtle Mountain Public Domain	21,831.08				

STATE OF MONTANA

②

BIA Area; BIA Agency; Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Northern Cheyenne Agency					
Northern Cheyenne Reservation	432,792.18			486,500[a]	486,500[a]
Turtle Mountain Public Domain	680.00				
Rocky Boy's Agency					
Rocky Boy's Reservation	108,015.05			131,400[a]	131,400[a]
MUSKOGEE AREA					
Osage Off-Res	400.00				
MT TOTAL 7	5,224,864.06	102,338	450,000	3,993,872	6,632,902

NOTES - MONTANA

a. Information provided by the State of Montana. A copy of that information and the footnotes used to prepare it is attached. Sources for that information are not relisted here but can be found in the attached Montana document.

b. United States Department of Interior Bureau of Reclamation, West Wide Study Report on Critical Water Problems Facing the Eleven Western States 310 (1975) (hereafter referred to as West Wide Study.)

c. U.S. Water Resources Council, Nationwide Analysis, (June 1977) (calculated from date from Tables 4A and 5A, Appendix I)

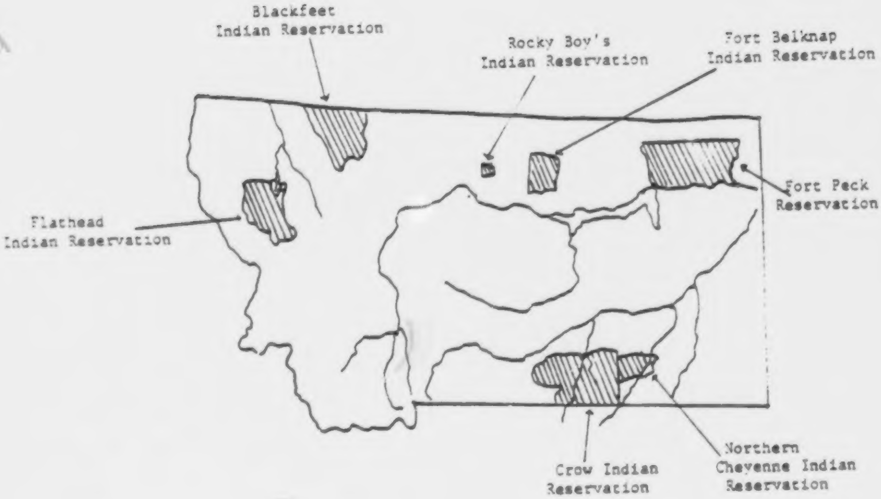
d. Calculated based on b. and c.

e. Information derived from claims made during negotiation on the Fort Peck Compact.

f. Claims made in Blackfeet Tribe v. Watt U.S. District Court, CV83-151-Gf.

g. Calculated based on f.

INDIAN RESERVATIONS OF MONTANA

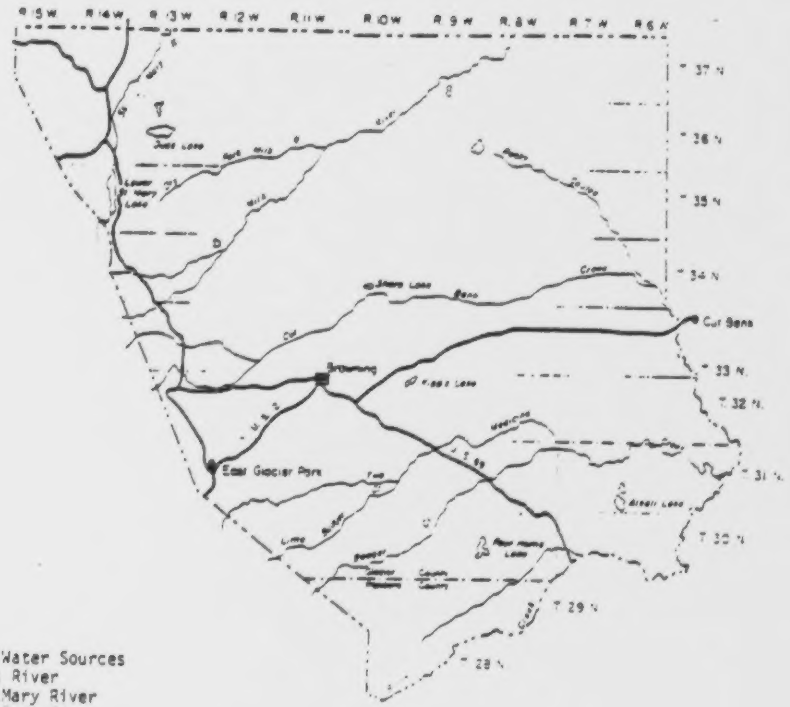

Blackfeet Indian Reservation
Rocky Boy's Indian Reservation
Fort Belknap Indian Reservation
Fort Peck Reservation
Flathead Indian Reservation
Crow Indian Reservation
Northern Cheyenne Indian Reservation

Indians living on or near Reservations: 24,366
Total land area of Reservations: 8,347,458 Acres

Source: Bureau of Indian Affairs, Department of the Interior, 1978, Report No. 262.

BLACKFEET INDIAN
RESERVATION

Size: 1,525,712 Acres
Pop: 6,246 Indians
1,200 Non Indians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T 36 N
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T 34 N
T 33 N
T 32 N
T 31 N
T 30 N
T 29 N
T 28 N
Lower St. Mary Lake
Cut Bank
Browning
East Glacier Park
U.S. 2
U.S. 89
Milk River
Cut Bank
Two Medicine
Creek

Major Water Sources
- Milk River
- St. Mary River
- Cut Bank River
- Two Medicine Creek
- Birch Creek

Use of Indian Trust
Land on Reservation

	Acres	Percent
Grazing	663,336	70.4
Dry Farm	115,666	12.3
Irrigable	23,056	2.4
Forest	115,793	12.3
Waste, Idle or Unclassified	24,195	2.6
Total	942,046 1/	100.0

1/ Includes approximately 31,989 acres of tribal fee land.

Source. USDI, BIA, Land Use Inventory and and Production Record, Report 50-1.

Estimated Water Requirements-2020^a (Acre-Feet)

Agriculture	644,100 322,500
Domestic	1,660 300
Industrial	800 100
Minerals	2,500 500
Energy	0 0
Forestry	0 0
Wildlife	228,600 0
Recreation	500 100
Total	878,100 323,500

[a] Double entries indicate diversion requirements and corresponding depletions.

Reference Source: Bureau of Indian Affairs, Department of Interior, 1978, Report No. 262.

THE BLACKFEET INDIAN RESERVATION

Estimated Annual Water Requirements for the Development of Area Resources - Blackfeet Reservation

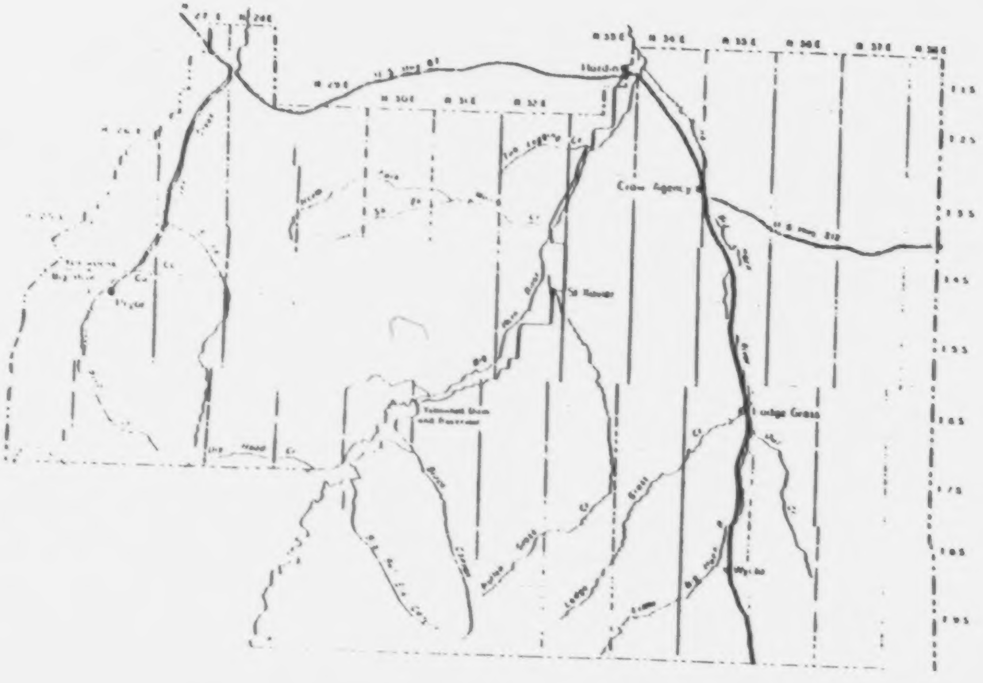
Water Use	1980 Acre-Feet	2000 Acre-Feet	2020 Acre-Feet
Irrigation, full serv.	69,984	259,442	351,743
Municipal & rural domestic	293	344	397
Industrial & mineral	391	387	388
Thermal electric	130	550	1,310
Livestock & dry crop	350	730	1,230
Watershed treatment	240	740	1,240
Secondary oil recovery	113	225	450
Recreation	454	1,782	2,727
Evaporation from reservoirs 1/	(1,260)	(2,960)	(3,930)
Total	71,955	264,200	359,535

1/ Evaporation from reservoirs is prorated among some of the other uses and is, therefore, not to be included in the summation.

According to BIA(Report No. 252- The Blackfeet Reservation-Its Land and People, 1977) 359,535 acre-feet is approximately 24% of the water that flows through or adjacent to the reservation annually.

CROW RESERVATION

Size: 2,282,764 Acres
Pop: 4,500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Hardin
Crow Agency
U.S. Hwy 212
St Xavier
Lodge Grass
Wyola
Pryor
Yellowtail Dam and Reservoir
Big Horn
Cr.
Lodge Grass Cr.
Dry Head Cr.

Use of Indian Trust
Land on Reservation

	Acres	Percent
Grazing	1,212,911	77.3
Dry Farm	200,867	12.8
Irrigable	30,287	1.9
Forest	107,612	6.9
Waste, Idle or Unclassified	17,551	1.1
Total	1,569,228	100.0

Source: USDI, BIA, Land Use Inventory and Production Record, Report 50-1.

Estimated Water Requirements 2020[a] (Acre-Feet)

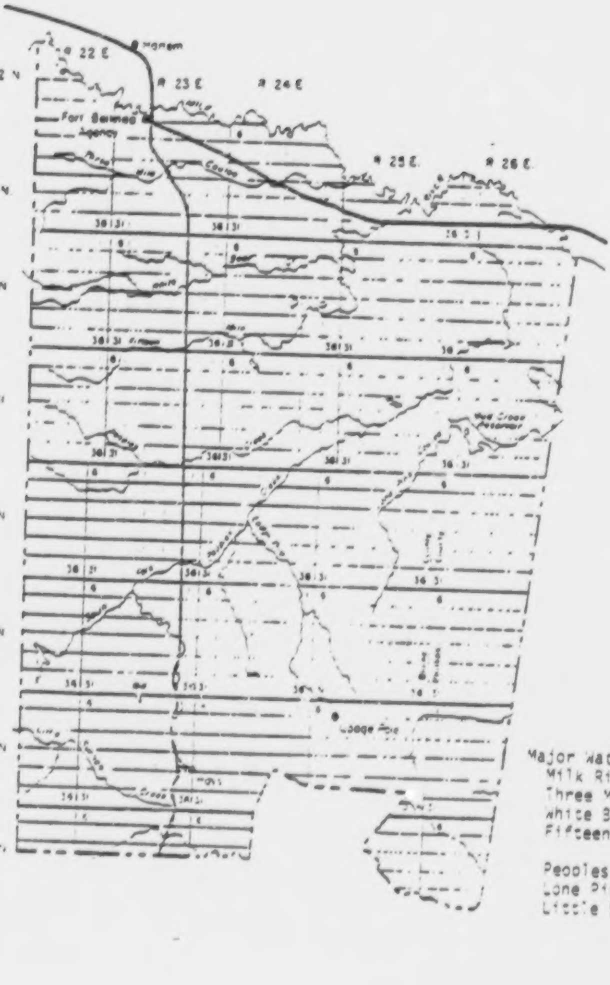
Agriculture	1,080,000 540,000
Domestic	1,800 400
Industrial	7,000 1,540
Minerals	0 0
Energy	196,500 196,500
Forestry	0 0
Wildlife	823,300 0
Recreation	500 115
Total	2,114,100 738,550

[a] Double entries indicate diversion requirements and corresponding depletions.

Reference Source: Bureau of Indian Affairs, Department of Interior, 1978, Report No. 262.

FORT BELKNAP RESERVATION
(ASSINIBOINE AND GROS VENTRE)

Size: 651,119 Acres
Pop: 1,797 Indians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Fort Belknap Agency
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T 26 N
T 25 N
Lodge Pole
Hays

Major Water Sources
Milk River
Three Mile Coulee
White Bear Creek
Fifteen Mile Creek
Peoples Creek
Lone Pine Coulee
Little Suction Creek

Use of Indian Trust
Land on Reservation

	Acres	Percent
Grazing	560,004	85.0
Dry Farm	50,661	7.7
Irrigable	18,081	2.8
Forest	26,831	4.1
Waste, Idle or Unclassified	2,900	0.4
Total	658,477 1/	100.0

1/ Includes land in Montana allotted to Turtle Mountain Indians (This is approximately 40,510 acres administered by the Fort Belknap Agency).

Source: USDI, BIA, Land Use Inventory and Production Record, Report 50-1.

Estimated Water Requirements 2020^a (Acre-feet)

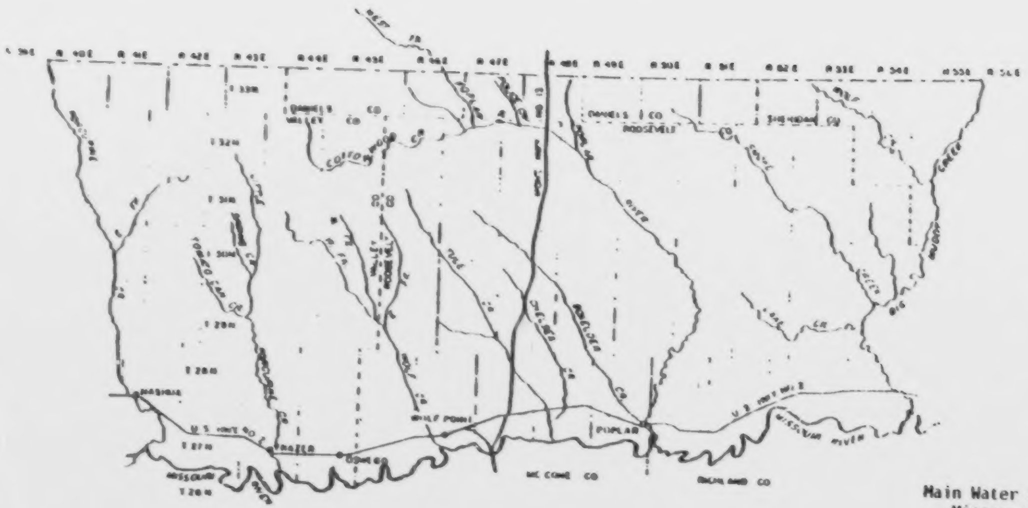
Agriculture	173,100 86,500
Domestic	400 100
Industrial	200 0
Minerals	0 0
Energy	0 0
Forestry	0 0
Wildlife	37,500 0
Recreation	200 0
Total	211,400 86,600

[a] Double entries indicate diversion requirements and corresponding depletions.

Reference Source: Bureau of Indian Affairs, Department of Interior, 1978, Report No. 262.

FORT PECK

Size: 2,093,124 Acres
Pop: 4,300 Sioux and Assiniboine
500 Chippewa and Cree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T 33N
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T 30N
T 29N
T 28N
T 27N
T 26N
VALLEY CO
DANIELS CO
ROOSEVELT
SHERIDAN CO
COTTONWOOD CR
TOBACCO GAR CR
TULE CR
CHELSEA CR
BOXELDER CR
WOLF CR
POPLAR
NASHUA
FRAZER
WOLF POINT
U.S. HWY 2
MISSOURI RIVER
BIG MUDDY CREEK
MC CONE CO
RICHLAND CO

Main Water Sources
Missouri River
Milk River
Porcupine Creek
Little Porcupine Creek
Big Muddy
Poplar River

Use of Indian Trust
Land on Reservation

	Acres	Percent
Grazing	649,850	68.2
Dry Farm	274,166	28.8
Irrigable	12,057	1.3
Forest	12,000	1.2
Waste, Idle or Unclassified	5,109	0.5
Total	953,182 1/	100.0

1/Includes land in Montana allotted to Turtle Mountain Indians (This is approximately 22,311 acres administered by the Fort Peck Agency).

Source: USDI, BIA, Land Use Inventory and Production Record, Report 50-1.

Estimated Water Requirements 2020[a] (Acre-Feet)

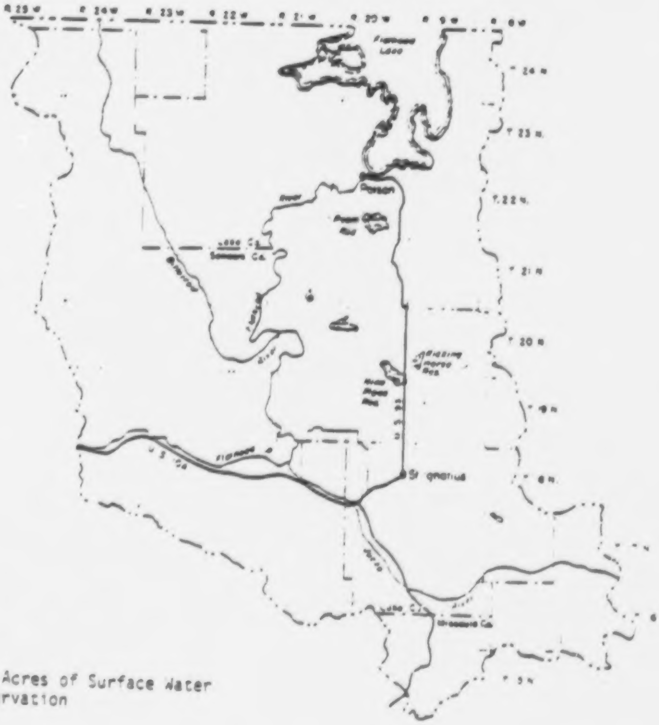
Agriculture	413,800 206,900
Domestic	1,100 200
Industrial	600 100
Minerals	0 0
Energy	0 0
Forestry	0 0
Wildlife	1,077,200 0
Recreation	300 100
Total	1,493,000 207,300

[a] Double entries indicate diversion requirements and corresponding depletions.

Reference Source: Bureau of Indian Affairs, Department of Interior, 1978, Report No. 262.

FLATHEAD INDIAN RESERVATION
CONFIDERATE SALISH AND KOOTENAI TRIBES

Size: 1,242,969 Acres
Pop: 3,150 Indians
16,000 Non Indians



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R 20 W
Flathead Lake
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T 22 N
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T 20 N
Polson
Lake Co.
Sanders Co.
Kicking Horse Res
U.S. 93
St Ignatius
Jocko

69,000 Acres of Surface Water
On Reservation

Major Water Sources
Jocko River
Flathead River
Bitterroot River

Use of Indian Trust
Land on Reservation

	Acres	Percent
Grazing	119,804	19.4
Dry Farm	5,791	0.9
Irrigable	12,636	2.1
Forest	448,522	72.6
Waste, Idle or Unclassified	30,696	5.0
Total	617,449	100.0

Source: USDI, BIA, Land Use Inventory and Production Record, Report 50-1.

Use of Indian Trust
Land on Reservation

	Acres	Percent
Grazing	235,441	54.2
Dry Farm	32,000	7.4
Irrigable	632	0.1
Forest	161,560	37.2
Waste, Idle or Unclassified	4,786	1.1
Total	434,419 1/	100.0

1/ Includes land in Montana allotted to Turtle Mountain Indians (This is approximately 680 acres administered by the Northern Cheyenne Agency).

Source: USDI, BIA, Land Use Inventory and Production Record, Report 50-1.

Estimated Water Requirements 2020[a] (Acre-Feet)

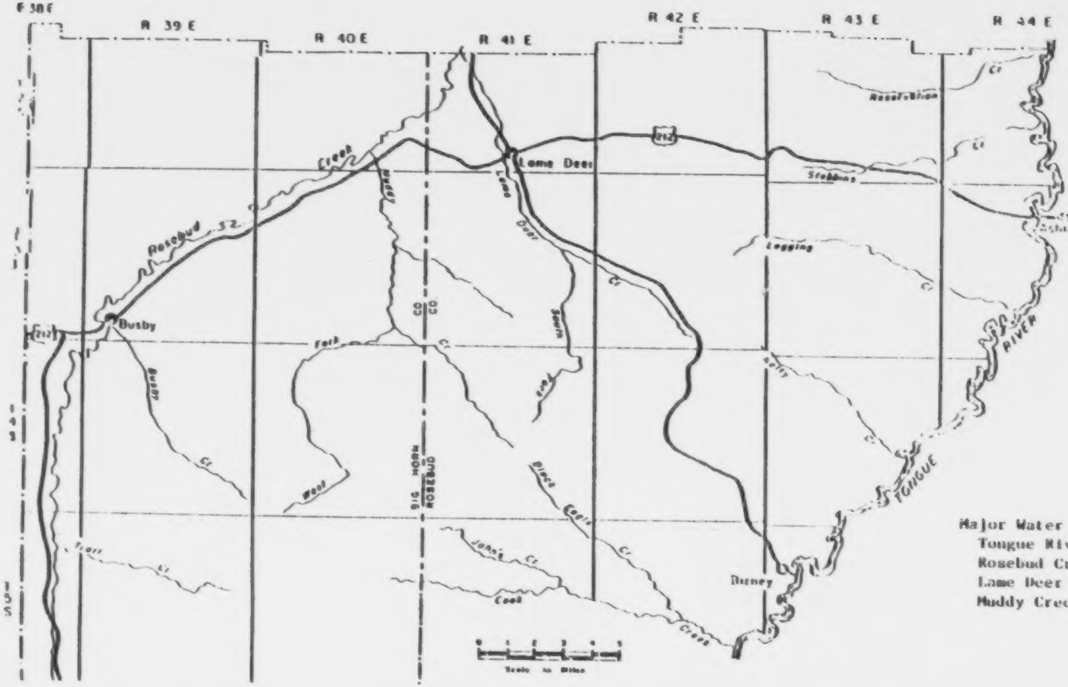
Agriculture	109,200 54,600
Domestic	1,400 300
Industrial	300 60
Minerals	0 0
Energy	196,500 196,500
Forestry	0 0
Wildlife	178,800 0
Recreation	300 60
Total	486,500

[a] Double entries indicate diversion requirements and corresponding depletions.

Reference Source-Bureau of Indian Affairs, Department of Interior, 1978, Report No. 262.

NORTHERN CHEYENNE RESERVATION

Size: 444,157 acres
Pop: 3,122 Indians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R 39 E
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R 42 E
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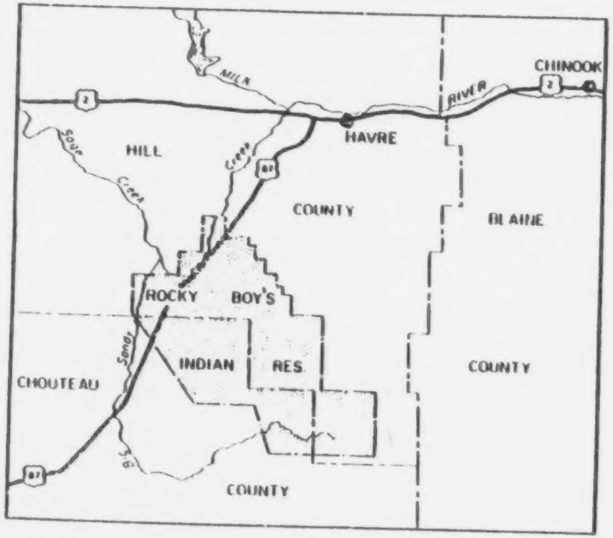
Lame Deer
Busby
Birney
212
Rosebud
Creek
Muddy
Lame
Deer
Cr
South
Fork
Cr
Wood
Busby
Cr
Trail
Cr
Black
Eagle
Cr
Johns
Cr
Cook
Creek
Kelty
Cr
Logging
Cr
Stebbins
Reservation
Cr
TONGUE
RIVER
CO
CO
BIG HORN
ROSEBUD
Scale in Miles

Major Water Sources
Tongue River
Rosebud Creek
Lame Deer Creek
Muddy Creek

ROCKY BOY
CHIPPEWA AND CREE

Size: 107,613 Acres
Pop: 1,749 Indians


MILK
RIVER
CHINOOK
2
HAVRE
HILL
Sage
Creek
Creek
87
COUNTY
BLAINE
ROCKY
BOY'S
INDIAN
RES.
CHOUTEAU
Sandy
B.
COUNTY
COUNTY
87

Major Water Sources
Big Sandy Creek
and Sage Creek

Use of Indian Trust Land on Reservation

	Acres	Percent
Grazing	80,872	75.1
Dry Farm	7,411	6.9
Irrigable	598	0.6
Forest	17,105	15.9
Waste, Idle or Unclassified	1,627	1.5
Total	107,613	100.0

Source: USDI, BIA, Land Use Inventory and Production Record, Report 50-1.

Estimated Water Requirements 2020[a] (Acre-feet)

Agriculture	128,900 64,400
Domestic	300 100
Industrial	100 0
Minerals	0 0
Energy	0 0
Forestry	0 0
Wildlife	2,100 0
Recreation	0 0
Total	131,400 64,500

[a] Double entries indicate diversion requirements and corresponding depletions.

Reference Source: Bureau of Indian Affairs, Department of Interior, 1978, Report No. 262.

STATE OF NEBRASKA

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Pine Ridge Reservation (See South Dakota for bal)	552.24		30[a]		81[a]
Omaha Reservation	27,012.39		7,390[b]		13,500[b]
Santee Sioux Reservation	9,358.06		1,640[c]		3,000[c]
Winnebago Reservation	27,469.85		5,422[b]		9,900[b]
Winnebago Off-Reservation	83.16				
NB TOTAL 4	64,475.70		14,482		26,481

NOTES - NEBRASKA

a. United States Department of the Interior Bureau of Indian Affairs, Potential Irrigation Development: Missouri River Basin Reservations (Missouri River Basin Investigations Project, Billings, Montana) (1976), Appendix 13, Table I (total irrigable acreage prorated between portions of reservation in Nebraska and South Dakota).

b. *Id.*, Appendix 16-17-18, Table 2.

c. *Id.*, Table 1.

STATE OF NEVADA

BIA Area: BIA Agency: Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
PHOENIX AREA					
Colorado River Agency					
Fort Mojave Reservation	3,862.15	1,322[a]	2,340[a] (6.46)[b]		15.116.40[c]
Eastern Nevada Agency					
Battle Mountain Colony	683.30	0[d]			
Duck Valley Reservation	144,274.30	13,000[d]	17,350[f] (5.5)[e]		95,425[g]
Duckwater Reservation	3,814.52	2,600[d]	(5.5)[e]		14,300[h]
Elko Colony	192.80	0[d]			
Ely Colony	100.32	0[d]			
Goshute Reservation	70,489.00	485[d]	(5.5)[e]		2,668[h]
Odgers Ranch	1,987.04				
Public Domain	1,709.70				
South Fork Reservation	13,049.52	4,073.89[d]			10,950.66[d]
Wells Colony	80.00	0[d]			
Wild Horse Reservoir	3,981.68				

STATE OF NEVADA

②

BIA Area; BIA Agency; Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Western Nevada Agency					
Carson Colony	160.00	0[d]			
Dresslerville Colony	39.80	0[d]			
Fallon Colony	60.00				
Fallon Reservation	8,120.00	3,025[d]	(4.5)[d]		13,612[j]
Ft. McDermitt Reservation	16,336.90	3,043.45[d]	(3.0)[d]		9.130[j]
Las Vegas Colony	10.15	0[d]			
Lovelock Colony	20.00	0[d]			
Moapa Reservation	1,185.59	550[d]	(7.5)[e]		4,125[h]
Public Domain	62,396.60				
Pyramid Lake Reservation	476,668.94	1,002[d]	(4.25)[d]		4,258[j]
Reno-Sparks Colony	28.87	0[d]			
Stewart Indian High School	3.102.14				
Summit Lake Reservation	10,862.91	0[d]			

STATE OF NEVADA

③

BIA Area, BIA Agency; Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Walker River Reservation	323,386.35	2,547[d]	4,980[i]		25,000[i]
Washoe Ranches	794.57	0[d]			
Winnemucca Colony	340.00	0[d]			
Yerington Colony	22.37	0[d]			
Yerington Reservation	1,631.88	750[d]	(6.3)[e]		4,725[h]
Yomba Reservation	4,718.49	2,044[d]	(5.5)[e]		11,242[h]
NV TOTAL 24	1,154,109.89	34,442.34	24,670		210,556.06

NOTES - NEVADA

a. Information provided by Arizona for an earlier WSWC draft report on potential Indian water right claims.

b. Unit withdrawal coefficient from Arizona v. California decree, 376 U.S. 340 (1964).

c. Calculated based on a. and b.

d. Information provided by Peter G. Morros, Nevada State Engineer.

e. U.S. Water Resources Council, Nationwide Analysis, (June 1977) (calculated from data from Tables 4A and SA, in Appendix I).

f. Information provided by Idaho for an earlier WSWC draft report on potential Indian water right claims.

g. Calculated based on f. and e.

h. Calculated based on d. and e.

i. This information is from a tabulation entitled "Indian Irrigation Projects Presently Included in the BIA

NOTES - NEVADA (Cont.)

Irrigation Construction Program - October 1975."
This document was compiled by the Bureau of Indian Affairs.

j. Calculated based on d.

STATE OF NEW MEXICO

①

BIA Area; BIA Agency; Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
ALBUQUERQUE AREA					
Albuquerque Indian School	47.12				
Jicarilla Agency					
Jicarilla Apache Reservation	742,315.42	0[a]	13,500[a]		36,288[a]
Mescalero Agency					
Mescalero Apache Reservation	460,401.99			17,309[b]	17,309[b]
Northern Pueblos Agency					
Nambe Pueblo	19,075.99	158[a]	3,154[c]		9,694.3[c]
Picuris Pueblo	14,946.88	75[a]	220[a]		770[a]
Pojoaque Pueblo	11,602.77	13[a]	3,016[c]		9,115.0[c]
San Ildefonso Pueblo	26,192.28	252[a]	2,139[c]		6,819.5[c]
San Juan Pueblo	12,237.46	873[a]	4,800[a]		16,800[a]
Santa Clara Pueblo	45,747.68	547[a]	2,500[a]		8,750[a]
Taos Pueblo	95,341.36	1,835[a]	6,000[a]		21,000[a]
Tesuque Pueblo	16,813.16	117[a]	3,702[c]		11,259.8[c]

STATE OF NEW MEXICO

BIA Area BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Ramah-Navajo Agency					
Ramah-Navajo	146,953.13				
Southern Pueblos Agency					
Acoma Pueblo	249,655.70	575[a]	2,302[a]		11,239[a]
Agency Headquarters	31.24				
Cochiti Pueblo	28,779.03	318[a]	1,864[a]		10,830[a]
Demonstration Range Mgt.	24.42				
Isleta Pueblo	211,034.30	4,078[a]	6,195[a]		37,108[a]
Jemez Pueblo	89,618.34	677[a]	2,105[a]		10,209[a]
Jemez Diversion Site	4.65				
Laguna Pueblo	443,106.19	287[a]	3,211[a]		15,670[a]
Laguna Public Domain	1,900.75				
Sandia Pueblo	22,870.91	1,054[a]	3,418[a]		19,859[a]
San Felipe Pueblo	48,929.90	398[a]	3,808[a]		22,124[a]
Santa Ana Pueblo	60,868.24	222[a]	3,031[a]		17,610[a]
Santo Domingo Pueblo	69,259.82	879[a]	4,300[a]		24,983[a]
Zia Pueblo	117,360.46	183[a]	2,432[a]		11,795[a]
Zia Diversion Site	22.15				

STATE OF NEW MEXICO

③

BIA Area; BIA Agency; Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Ute Mountain Ute Agency					
Ute Mountain Reservation	104,978.00				
Zuni Agency					
Zuni Pueblo	408,403.81	1,305[a]	2,600[a]		9,100[a]
NAVAJO AREA					
Navajo Reservation	2,383,015.00				
Navajo Off-Res	1,436,494.34				
Eastern Navajo Agency					
Alamo Navajo	63,108.83				
Canoncito Navajo	76,812.84				
NM TOTAL 26	7,408,225.35	13,846	74,297	17,309	328,332.6

NOTES - NEW MEXICO

a. This information is from a tabulation entitled "Indian Irrigation Projects Presently Included in the BIA Irrigation Construction Program - October 1975." This document was compiled by the Bureau of Indian Affairs.

b. Claim made by the Mescalaro Apache Tribe in New Mexico v. Lewis, Chaves County, Cause Nos. 20294 & 22600.

c. Claims made by the listed Pueblos in New Mexico v. Aamodt, U.S. District Court, Cause No. CIV 6639M.

STATE OF NORTH DAKOTA

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Fort Berthold Reservation	419,037.08		25,000[a] (2.85)[e]		71,250[f]
Fort Berthold Off-Reservation	1,760.00				
Devil's Lake Sioux Reserva. (Fort Totten)	51,702.97		20,099[b] (2.85)[e]		57,282.15[f]
Sisseton Wahpeton Reservation (See South Dakota for Balance)	2,592.26		277.67[c]		970.25[c]
Standing Rock (See South Dakota for Balance)	299,542.45		21,249.84[d]		60,542.63[d]
Turtle Mountain Reservation	33,282.72				
Turtle Mountain Off Reservation	43,956.44				
Wahpeton School	52.07				
TOTAL	851,925.99		66,626.51		190,045.03

NOTES - NORTH DAKOTA

a. United States Department of Interior Bureau of Indian Affairs, The Fort Berthold Reservation Area: Its Resources & Development Potential, (Missouri River Basin Investigations Project, Billings, Montana) (1971), pg 79.

b. United States Department of Interior Bureau of Indian Affairs, The Fort Totten Reservation: Its Resources and Development Potential Affairs, (The Planning Support Group, Billings, Montana) (1976).

c. United States Department of the Interior Bureau of Indian Affairs, Potential Irrigation Development: Missouri River Basin Reservations (Missouri River Basin Investigations Project, Billings, Montana) (1976), Appendix 20, Tables 1,2,3, (total irrigable acreage listed prorated between portions of reservations in North Dakota and South Dakota).

d. Id., Appendix 9, Table 1 (total irrigable acreage listed prorated between portions of reservations in North Dakota and South Dakota).

e. Unit withdrawal coefficient from Standing Rock Reservation used. (Calculated by dividing the potential claim for the Standing Rock Reservation by the number of irrigable acres on the reservation as per information contained in the report listed in note d. above.)

STATE OF OREGON

BIA Area; BIA Agency; Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
PHOENIX AREA					
Western Nevada Agency					
Fort McDermitt Reservation	18,828.79				
PORTLAND AREA					
Celilo Village	35.98				
Celilo Village Fishing Sites	10.60				
Chemawa Indian School	347.36				
Umatilla Agency					
Umatilla Reservation	85,261.51		25,360[a] (5.0)b		126,800[c]
Warm Springs Agency					
Wyandotte Allotments	80.00				
Burns Paiute Public Domain	11,625.93	140[d]	140[d]		800[d]
The Dalles Public Domain	5,166.47				
Warm Springs Reservation	636,003.50	282[d]	1,292[d]		7,493[d]

STATE OF OREGON

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
West Wide Study Est.		1,800[e]	100,000+[e] (4.5)[f]		450,000[g]
OR TOTAL 3	757,362.54	1,800[h]	100,000[h]		450,000[h]

NOTES - OREGON

a. United States Department of Interior Bureau of Indian Affairs, The Confederated Tribes of the Umatilla Indian Reservation: Its Resources and Development Potential, (Planning Support Group, Billings, Montana) (1976).

b. U.S. Water Resources Council, Nationwide Analysis, (June 1977) (calculated from the data in Appendix I).

c. Calculated using information in a. and b.

d. This information is from a tabulation titled "Indian Irrigation Projects Presently Included in the BIA Irrigation Construction Program - October 1975." This document was compiled by the Bureau of Indian Affairs.

e. West Wide Study p. 365. ("Ultimate irrigable reservation lands (in Oregon) are in excess of 100,000 acres.")

f. West Wide Study p. 132.

g. Calculated based on f. and g.

h. The totals listed are not based on the addition of all numbers in the respective columns, Rather, the West Wide Study estimates for the entire state have been used as

NOTES - OREGON (Cont.)

the state total. This is done on the assumption that the estimates listed in the columns above the West Wide Study estimates would be included in the West Wide Study total.

STATE OF SOUTH DAKOTA

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Cheyenne River Reservation	1,400,483.38		50,176[a]		175,700[a]
Cheyenne River Off-Reservation	4,020.92				
Crow Creek Reservation	127,152.74		43,868[b]		153,600[b]
Crow Creek Off-Reservation	274.49				
Flandreau Santee Sioux	2,182.81				
Flandreau School	173.50				
Lower Brule Reservation	126,475.44		17,010[b]		59,500[b]
Pierre School	141.62				
Pine Ridge Reservation (See Nebraska for Balance)	1,781,990.73		96,770[c]		261,219[c]
Rosebud Sioux Reservation	958,152.82		156,715[d]		423,000[d]
Sisseton Wahpton Reservation (See North Dakota for Bal.)	105,347.76		11,284.33[e]		39,429.75[e]

STATE OF SOUTH DAKOTA

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Standing Rock Reservation (See North Dakota for Balance)	550,460.87		39,050.16[f]		111,257.37[f]
Yankton Reser.	34,361.65		24,924[g]		45,600[g]
SD TOTAL 9	5,091,218.73		439,797.49		1,269,306.37

NOTES - SOUTH DAKOTA

a. United States Department of the Interior Bureau of Indian Affairs, Potential Irrigation Development: Missouri River Basin Reservations (Missouri River Basin Investigations Project, Billings, Montana) (1967), Appendix 10, Table 1.

b. Id., Appendix 11-12 , Tables 1,2.

c. Id., Appendix 13, Table 1 (total irrigable acreage prorated between portions of reservation in South Dakota and Nebraska).

d. Id., Appendix 14, Table 1.

e. Id., Appendix 20, Tables 1,2,3 (total irrigable acreage prorated between protions of reservation in South Dakota and North Dakota).

f. Id., Appendix 9, Table 1 (total irrigable acreage prorated between portions of reservation in South Dakota and North Dakota).

g. Id., Appendix 15, Table 1.

STATE OF UTAH

BIA Area, BIA Agency; Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
ALBUQUERQUE AREA					
Ute Mountain Ute Agency					
Ute Mountain Reservation	11,135.57				
NAVAJO AREA					
Navajo Reservation	1,193,565.46				
Navajo Off-Res.	965.99				
PHOENIX AREA					
Eastern Nevada Agency					
Goshute Reservation	38,523.70	443[a]	820[a]		3,300[a]
Intermountain School	265.48				
Uintah and Ouray Agency					
Skull Valley Reservation	17,444.65	40[a]	6,040[a]		18,120[a]
Uinta & Ouray Reservation	1,021,445.65		120,157[b]	481,078[b]	481,078[b]

STATE OF UTAH

BIA Area, BIA Agency, Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
"Miscellaneous" Utah Reservations (not inc. Uin & Our Skull Val or Goshute)		2,692[a]	45,503[a]		127,509[a]
UT TOTAL 5	2,283,986	3,175	172,520	481,078	630,007

NOTES - UTAH

a. This information is from a tabulation entitled "Indian Irrigation Projects Presently Included in the BIA Irrigation Construction Program - October 1975." This document was compiled by the Bureau of Indian Affairs.

b. Values contained in the unratified Ute Indian Water Compact.

STATE OF WASHINGTON

①

BIA Area; BIA Agency; Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
PORTLAND AREA					
Colville Agency					
Colville Reservation	1,011,871.12		15,000[a] (5.0)[b]		75,000[c]
Public Domain	2,675.95				
Olympic Peninsula Agency					
Chehalis Reservation	2,076.06				
Hoh River Reservation	443.00				
Lower Elwah Reservation	372.00				
Makah Reservation	27,027.13				
Ozette Reservation	719.00				
Public Domain	2,348.35				
Quileute Reservation	813.84				
Quinault Reservation	130,750.08				
Shoalwater Reservation	335.00				
Skokomish Reservation	2,951.02				
Squaxin Island	827.89				

STATE OF WASHINGTON

②

BIA Area; BIA Agency; Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Washington Fishing Site	30.93				
Puget Sound Agency					
Lummi Reservation	7,386.66		4,390[a] (4.8)[d]		21.072[e]
Muckleshoot Reservation	1,234.76				
Nisqually Reservation	770.86				
Nooksack Reservation	0.97				
Port Gamble Reservation	1,303.00				
Port Madison Reservation	2,849.42				
Public Domain	4,336.75				
Puyallup Reservation	65.04				
Swinomish Reservation	3,609.76				
Tulalip Reservation	10,805.05				
Spokane Agency					
Kalispel Reservation	4,557.41				
Spokane Reservation	133,179.15				
Public Domain	464.72				

STATE OF WASHINGTON

③

BIA Area; BIA Agency; Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/Drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
Yakima Agency					
Yakima Reservation	1,120,736.49			3,275,733[g]	3,275,733[g]
Public Domain	21,881.48				
West Wide Study Est. (entire state)		165,000[f]			
WA TOTAL 23	2,496,422.89	165,000	19,390	3,275,733	3,371.805

NOTES - WASHINGTON

a. This information is from a tabulation entitled "Indian Irrigation Projects Presently Included in the BIA Irrigation Construction Program - October 1975." This document was compiled by the Bureau of Indian Affairs.

b. U.S. Water Resources Council Nationwide Analysis (June 1977) (calculated from data from Tables 4A and 5A in Appendix I.)

c. Calculated based on a. and b.

d. West Wide Study p. 132.

e. Calculated based on a. and d.

f. West Wide Study p. 401.

g. United States Department of Interior, Bureau of Indian Affairs Yakima Indian Reservation: Agricultural Potential (1956). The publication lists the total water needs of the Yakima Indian Reservation by the year 2020 as:

Municipal	6,627
Rural Domestic	8,482
Irrigation	2,189,594
Tribal Industry	8,880
Fish & Wildlife	587,650
Water Quality	474,500
	3,275,733 AcFt/Yr.

STATE OF WYOMING

BIA Area; BIA Agency; Jurisdiction	Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres (Unit W/drwl.)	Other Estimate of Water Needs	Potential Claim AcFt/Yr
BILLINGS AREA					
Wind River Agency					
Wind River Reservation	1,888,031.81		103,000[a]		477,292[b]
WY TOTAL 1	1,888,031.81		103,000		477,292

NOTES - WYOMING

a. Acreage established in In Re The General Adjudication of all Rights to use Water in the Big Horn River System and all Their Sources, State of Wyoming, Judgement and Decree Civil No. 4993, Fifth Judicial District, State of Wyoming.

b. Id., To ameliorate the impact of exercise of the rights the court decreed that, before the Indians could use approximately 188,000 acre feet of the right to irrigate future projects, storage facilities would have to be constructed to provide such water

STATE BY STATE SUMMARY

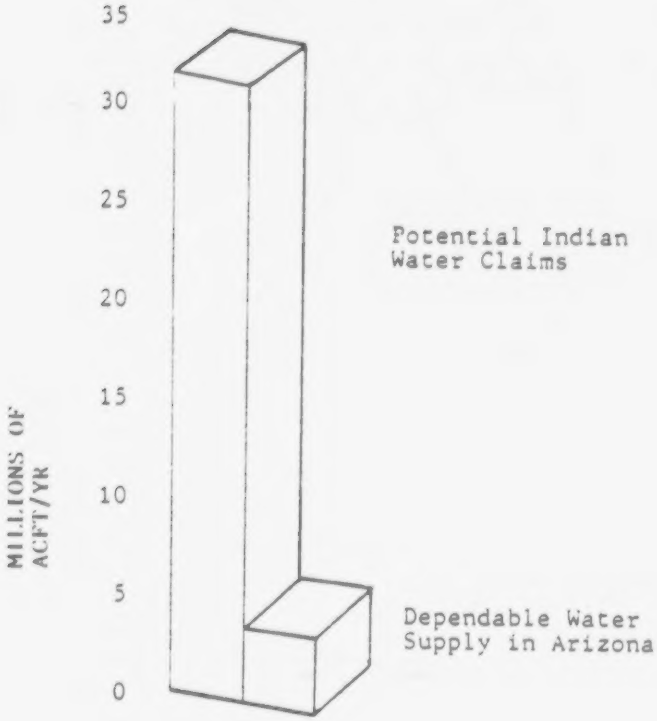
BIA Area, BIA Agency, Jurisdiction		Gross Area in Acres	Presently Irrigated Acres	Potentially Irr. Acres	Other Estimate of Water Needs	Potential Claim AcFt/Yr
ALASKA	7	386,142.19	0	0	0	0
ARIZONA	20	19,808,056.88	188,410	6,516,208	18,034,825	31,273,343
CALIFORNIA	80	573,235.34	14,741	58,665	0	269,282
COLORADO	2	755,399.71	0	93,000	0	0
IDAHO	5	826,863.26	102,229	227,417	0	762,721
MONTANA	7	5,224,864.06	102,338	450,000	3,993,872	6,632,902
NEBRASKA	4	64,475.70	0	14,482	0	26.481
NEVADA	24	1,154,109.89	34,442.34	24,670	0	210,556.06
NEW MEXICO	26	7,408,225.35	13,846	74,297	17,309	328,332.6
NO. DAKOTA	6	851,925.99	0	66,626.51	0	190,045.03
OREGON	3	757,362.54	1,800	100,000	0	450,000
SO. DAKOTA	9	5,091,218.73	0	439,797.49	0	1,269,306.37
UTAH	5	2,283,986.00	3,175	172,520	481,078	630,007
WASHINGTON	23	2,496,422.89	165,000	435,000	0	3,371,805
WYOMING	1	1,888,031.81	0	103,000	0	477,292

It should be understood that this summary is intended only to provide an overview of the quantity of potential Indian water claims. As noted previously, application of the PIA standard to the number of potentially irrigated acres listed for some of the reservations in the tables would probably result in a smaller water right award than the potential claim listed. On the other hand, because of lack of information, no irrigable acreage or potential claim data were listed for many reservations, some with very large gross areas. Also, few Indian claims for fisheries, natural resource or industrial development, et cetera, were included. Thus the listed potential claims are less than they would be had a claim for all reservations been included and had all theories on which claims might be based been pursued.

Consideration of the following comparisons gives a feel for the relative magnitude of the potential claims. Added together they total approximately 45.9 million acre feet per year. This is equal to, for example, approximately 3.5 times the average annual flow of the Klamath or Colorado Rivers, more than 5 times the flow of the Flathead or Salmon Rivers or nearly 25 times the flow of the San Juan or Yuba Rivers. It is equal to roughly 1.5 times the storage capacity of Lake Powell or Lake Mead.

The state with the largest potential claim is Arizona. As the graphic below illustrates, Arizona's dependable water supply pales in comparison.

ILLUSTRATION III



COMPARISON OF POTENTIAL INDIAN WATER CLAIMS AND DEPENDABLE WATER SUPPLY IN ARIZONA

In the other states the proportions reflected above in Illustration III would be reversed. That is to say the potential Indian claims would be a fraction of the dependable water supply, in some instances a very small fraction. However, in this regard, the important question seems to be not the amount of water physically located within a state's borders but rather the amount available for new uses. As Illustration I demonstrated (reproduced on pages 4-5) when instream needs and off-stream consumption are considered, there is little unused water left in the West.

V. Attempts to Quantify Indian Water Rights

A. Litigation

Since Winters was decided, there has been little agreement as to the procedure which should be used to quantify Indian water rights. Clearly, litigation remains the most frequently used recourse. However, settlement through negotiation and legislation has also been used. 25/

With respect to litigation, considerable controversy has revolved around the question of whether state or federal courts should be the favored forum for determining the scope of the Winters right. Though the early cases were generally decided in federal court, with passage of the McCarran amendment in 1952 26/ Congress stated its intention that Indian water rights be adjudicated in state courts. The Indians and their federal trustees resisted this, fearing prejudice and provinciality. Nevertheless, recent Supreme Court decisions have re-emphasized the federal statutory preference for the state forum. 27/

When given the opportunity to function properly, state courts have proven their ability to effectively and fairly resolve conflicting water claims to a given water source. The courts effectuate this process through water decrees which quantify water rights, establish conditions for use, and assign priority dates among competing water users. The court orders used to issue such decrees are protected by legal doctrine of res judicata which generally prevents relitigation of court decreed rights. The judicial process, therefore, is capable of effectuating a permanent and all-encompassing determination of competing rights to a single water source.

Unfortunately, few court decrees have been issued which include Indian water rights. In 1910 and 1928 decrees establishing Indian water rights in portions of the Salt and Gila watersheds were issued. [28/] A similar decree, the Orr Ditch decree, was issued in 1944, [29/] determining the rights of the Pyramid Lake Paiute Indian Tribe to water from the Truckee River for the Pyramid Lake Reservation. The Indian parties to each of these decrees have traditionally viewed them as unrepresentative of their full water right entitlements. However, this position is not supported by the Supreme Court's recent decision in Nevada v. United States [30/] holding that res judicata prevents relitigation of the Pyramid Lake Indian Tribe's alleged right to an increase in water from the Truckee River to support a fishery. This reaffirmation of the finality of such a decree is significant. However, as mentioned above, relatively few adjudication decrees include Indian water rights.

Water litigation is oft times expensive and time consuming and has led to delivery of very little "wet water" for Indian tribes. The original action which led to the Orr Ditch decree in 1944 was commenced in 1913. The decision upholding the finality of the decree was handed down in 1983.[31] The Arizona v. California case was filed approximately 10 years before the decision was issued in 1963. However, the Court issued further opinions in the case in 1979 and 1983.[32] Often, many years are spent preparing for complex cases involving Indian water rights before the cases ever go to trial.

In addition to investments of time, a great deal of money has been expended litigating Indian reserved water right claims. Although most states have incomplete information relating to such costs, the following gives some idea of the amount the states have spent. Nevada estimates its expenditures at $1.5 to $2 million on such litigation. New Mexico has expended $475,000 for contractual services for three cases for which figures are available. South Dakota estimates its expenditures at approximately $200,000 for one recently dismissed action which never proceeded past initial stages. Wyoming, with a single Indian reservation within its borders, estimates its reserved rights litigation expenditures at approximately $7.2 million.

The above numbers are rough estimates and probably do not reflect any state's entire expenditures for Indian reserved rights litigation. A look at the federal expenditures may give a more complete picture of the costs involved. In a speech to the National Water Resources Association, Interior Solicitor William Coldiron stated, "The Bureau of Indian Affairs has recently estimated that the average tribal water rights case costs the BIA $3 million." He went on to explain that this figure included "just the BIA's costs" and did not reflect expenditures by the Justice Department or by other Department of Interior entities.33/

Even though litigation has proven expensive, time consuming and productive of relatively few settled Indian water rights, it remains the favored method of seeking resolution of Indian water rights issues. In addition to the decided cases, the following state by state summary of pending litigation involving Winters rights demonstrates the present dependence on litigation as a method of resolving Indian water claims. The list is not necessarily exhaustive. In many instances the listed actions have been pending for several years.

ILLUSTRATION IV

PENDING INDIAN WATER RIGHT CASES IN THE WESTERN STATES

ALASKA

None

ARIZONA

Gila River General Adjudication

The state court has lifted its stay in the consolidated adjudications on the Gila River Watershed. At the present time the court has set up a briefing schedule in which motions to dismiss the proceedings filed by the United States and some of the tribes and the responses to those motions are being updated. Oral argument on the motions is set for December 16, 1983.

United States v. City of Phoenix, et al

Suit on behalf of the Salt River Pima-Maricopa Indian Community seeking a declaration of their rights to surface and ground water in the eastern portion of the Phoenix Active Management Area. The suit also requests damages from numerous defendants for use of plaintiffs' surface and ground water rights and seeks an injunction prohibiting the continued withdrawal of surface water and groundwater by the defendants. Presently the U.S. has notified the Court that it will not be ready to proceed in this matter for some time and the judge has agreed to maintain the case in an inactive posture for several months.

United States v. Roosevelt Water Conservation District, et al.

This suit was brought on behalf of the Gila River Indian Community and seeks the same relief as that in the Salt River proceeding relating to surface water and ground water within the Pinal and Phoenix Active Management Areas and including the Gila River and its tributaries. The case is presently on the same inactive status as the Salt River suit.

Salt River Pima-Maricopa Indian Community v. U.S., et al.

Suit was filed by the tribe seeking a declaration that it was entitled to additional water based upon the Executive Order creating the reservation, the Kent Decree, specific acts by the Secretary of the Interior and the surplus water created by the Salt River Project. On March 22, 1983, the Court dismissed that part of the complaint alleging that the tribe was being damaged by contracts authorizing the withdrawal and transportation of water outside the boundaries of the Salt River Project. That decision is being appealed by the tribe to the 9th Circuit Court of Appeals while the remaining issues have yet to be decided by the district court.

United States v. Gila Valley Irrigation District, et al.

The Gila River Indian Community has been granted the right to intervene in the Gila River proceeding which produced the Globe Equity Decree in 1935. Under the terms of that decree the United States District Court for the District of Arizona retains jurisdiction. In its motion seeking intervention the Community stated that if it was allowed to intervene it would file a complaint which would seek to have the Globe Equity Decree properly administered and would also seek to assert its Winters rights. Although the Court has allowed the Community to intervene, it has requested the Community to amend the proposed complaint filed with the motion to intervene to more specifically set forth the tribal claims.

Salt River Pima-Maricopa Indian Community v. H.S. Aquilar, et al.

This proceeding was instituted by the Community against all ground water users located in what it terms the East Salt River Valley ground water basin. The complaint alleges that the withdrawals of ground water by non-Indian pumpers have been in excess of the recharge and that such withdrawals have diminished the value of the Community's farmlands and substantially increased the costs of using ground water to irrigate its lands. The Community requests $150,000,000 in damages, a determination of what the average annual safe yield is for the area in question, a declaration that the Community has first priority to withdraw the safe yield, a finding as to how much water is necessary to cultivate the Community's land, a determination of what portion of the safe yield may be withdrawn by the defendants and an injunction prohibiting all of the defendants from withdrawing ground water in excess of their apportioned shares.

White Mountain Apache Tribe v. Watt, et al.

In a recently filed action the tribe seeks to have the court declare that the United States is inadequately representing the tribe's interests relating to water rights, that the U.S. is exercising the tribe's water rights for the benefit of other federal projects, that the U.S, has mismanaged the tribe's natural resources and that the consolidated state court adjudications be enjoined.

CALIFORNIA

Arizona v. California

The pending portion of this case relates to boundary changes of the Colorado River, Fort Mohave and Fort Yuma Indian reservations. (See immediately following item.)

Metropolitan Water District, et al. v. United States, et al.

This case has been filed in the United States District Court, San Diego, and was held in abeyance while the Supreme Court was considering Arizona v. California. With the Court's decision now released, this case is now under way. The issue is the validity of three orders of the Secretary of the Interior to alter the boundaries of three Indian reservations in such a way as to effect water rights under the Winters doctrine.

Rincon Bank of Mission Indians v. Escondidio Mutual Water Co.

At issue is the quantification of the water rights of the La Jolla, Rincon, Pala, Pauma and San Pasqual Indian Tribes. Also in question is the liability of the Secretary of the Department of Interior for the past loss of Indian water rights.

COLORADO

In the Matter of the Application for Water Rights of the United States, Water District No. 7 Colorado

The Ute Mountain Ute and Southern Ute Tribes are participating in this general adjudication proceeding aimed at quantification and determination of rights to streams flowing through their reservations. This is the case that was remanded to state court from federal court by the Supreme Court's decision in Colorado River Conservation District v. United States (the Akin case).

IDAHO

None

MONTANA

Seven separate federal actions involving the quantification of reserved rights for various Indian reservations in the state were consolidated into a single action, Northern Cheyenne Tribe v. Adsit et al. The United States Supreme Court recently held that the federal district court acted properly in dismissing the federal actions in favor of state actions which would adjudicate the rights for the same tribes.

The case was remanded to the Ninth Circuit Court of Appeals where it is currently pending.

Blackfeet Tribe v. Watt

This federal court suit challenges Montana's authority to administer (as opposed to adjudicate) Indian water rights inside the Blackfeet Indian reservation. It further claims that there are 450,000 acres of PIA lands within the reservation (which require a unit withdrawal of 4.5 acre feet of water per year) and that conflict of interest and capriciousness have kept the Secretary of Interior from recognizing the Tribe's vested water right to the water necessary to irrigate these lands. The amount to which the tribe claims a vested right is approximately twice the amount of water on the reservation.

Confederated Salish and Kootenai Tribe v. Montana

This federal suit challenges Montana's authority to administer water rights (either reserved rights or rights to "surplus" water) within the Flathead reservation. It contends that the McCarran Amendment waived the sovereign immunity of the United States but not Indian tribes.

NEBRASKA

None

NEVADA

The Supreme Court's recent decision in Nevada v. United States, which held that res judicata prevents the reopening of the Orr Ditch decree for a newly alleged fishery water right for the Pyramid Lake Piaute Indian Tribe, brought finality to the most critical Indian water rights litigation the state has faced. The objective of the tribe in the action was to enhance the flow of the Truckee River into Pyramid Lake to improve the fishery in the lake. As many as eight other law suits aimed at this purpose are still pending although not all involve Indian reserved water rights directly. Also, the Carson River adjudication is being challenged in the Supreme Court.

NEW MEXICO

New Mexico v. United States

This is a general adjudication intended to determine the water rights of all parties to the San Juan River. The suit involves water rights of the Ute Mountain Ute, Navajo and Jicarilla Apache Tribes.

Jicarilla Apache Tribe v. United States

This suit was brought by the Jicarilla Apache Tribe to determine its water rights to the Navajo River, a tributary to the San Juan.

New Mexico v. Aamodt

This is a general stream adjudication of the Rio Pojoaque system which involves the water rights of the San Ildefonso, Nambe, Tesuque and Pojoaque Pueblos. As with some of the other cases pending in New Mexico, the suit is complicated by the possible affect of Spanish and Mexican law on the determination of water rights for the Pueblos.

Anaya v. Public Service Co.

This is a general adjudication suit for the Santa Fe stream system. It may involve water right claims for the Cochiti Pueblo.

New Mexico v. Abbott

This is a general adjudication suit for a portion of the Rio Grande system. It involves water rights for the San Juan, Santa Clara and San Ildefonso Pueblos.

Zuni Tribe v. City of Gallup

This is a general adjudication suit for the Zuni stream system and related ground water aquifers.

New Mexico v. Abeyta

This is a general adjudication for tributaries of the Rio Grande involving the water rights of the Taos Pueblo.

New Mexico v. Lewis

This is a general adjudication suit for the tributaries of the Pecos River which involves the water rights of the Mescalero Tribe.

New Mexico v. Aragon

This is a general adjudication suit for the Chama River and tributaries which involves the water rights to the San Juan Pueblo and the Jicarilla Apache Tribe.

United States v. Bluewater-Toltec Irrigation District

This is a water "trespass" suit under 28 U.S.C. § 2415 brought against all surface and ground water right claimants in the Rio San Jose stream system. The suit was brought on behalf of the Acoma and Laguna Pueblos.

United States v. Abousleman

This is a suit to adjudicate all water right claims in the Rio Jemez stream system. It also requests injunctive relief and damages for trespass under 28 U.S.C. § 2415. The suit was brought on behalf of the Jemez, Santa Ana and Zia Pueblos.

NORTH DAKOTA

None

OREGON

United States v. Adair

This is a suit filed by the United States to determine among other things, the water rights of the Klamath Tribe and individual allottees in the Williamson River. A separate state adjudication involves the entire Klamath River above the California-Oregon border. The Ninth Circuit Court of Appeals recently handed down its opinion in Adair holding, among other things, that: (1) reserved water rights are appurtenant to Indian lands, including allotments, and may be acquired by non-Indians who purchase Indian lands, and (2) the Klamath Tribe has hunting and fishing water rights with an immemorial priority date to be defined based on the tribe's current hunting and fishing activities. A petition for rehearing has been filed in the case. It is expected that petitions for writ of certiorari may eventually be filed.

SOUTH DAKOTA

None

UTAH

None

WASHINGTON

Washington v. Aquavella, et al.

This is a general adjudication in state court of the Yakima River. It involves the water right claims of the United States on behalf of the Confederated Tribes and Bands of the Yakima Indian Nation. The case is now pending in the Washington State Supreme Court on a "necessary parties" issue.

Colville Confederated Tribes v. Walton

This is a federal court suit to determine water rights to the small reservation-restricted No Name Creek. It involves water right claims of the Confederated Tribes of the Colville Reservation.

United States v. Anderson

This is a suit brought by the United States as trustee for the Spokane Indian Tribe to determine the water rights of the Spokane Indian Tribe to the Chamokane Creek. It is presently on appeal to the Ninth Circuit Court of Appeals.

In re Antoine Creek

This state court suit involves a claim made by the United States on behalf of an individual Indian allottee asserting reserved rights for allotments located outside the reservation, for irrigation purposes.

Holly v. Totus

This federal court suit was brought by the State of Washington, several corporations, and individuals seeking to invalidate a "water code" adopted by the Yakima Nation.

In re Omak Creek

This is a general adjudication of the Omak Creek system, a tributary of the Columbia River System, whose reach is located within the Colville Indian Reservation.

Yakima Indian Nation v. United States

This is a federal court suit brought by the Yakima Indian Nation to determine the scope and extent of its water rights on the Yakima River System. The case has been stayed pending the outcome of Washington v. Acquvella.

Sunnyside Valley Irrigation Dist. v. Kittitas Reclamation District

This case centers on the scope of Indian reserved rights held by the United States for the benefit of the Yakima Indian Nation with primary emphasis centering on water rights for fisheries.

WYOMING

The Wyoming Fifth Judicial District Court recently decided In re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, a general adjudication suit which quantifies water rights for the Wind River Indian Reservation. All parties have filed motions for amendments to the decree. An appeal of the decision to the State Supreme Court is anticipated.

B. Legislation

Attempts to quantify Winters water rights through legislative avenues fall generally into two categories. These are situation-specific (or reservation-specific) legislation and legislative proposals which would establish nationwide standards for quantification. Relatively speaking, neither method has yet proven particularly successful in quantifying Winters rights.

Among the reservation-specific legislative attempts are the Navajo Indian Irrigation Project (NIIP), and the Ak Chin and Papago settlements. The bill authorizing NIIP was enacted by Congress in 1962. Its intent was to create a farming operation for the Navajo Tribe based on irrigation water from the San Juan River to which the Tribe was entitled because of its Winters water rights. A companion bill authorized the San Juan-Chama Diversion Project. The legislation quantified an amount of water the Navajos were entitled to receive for NIIP and also created a mechanism for sharing shortages of water between Indian and non-Indian users.

Unfortunately, so many questions have arisen regarding the interpretation of the NIIP legislation that its utility as a "settlement" of the Navajo Winters rights is questionable. These questions relate to what might be considered the most basic of concerns regarding the legislation, such as whether the Indians may deplete or divert the 508,000 acre-feet entitlement the legislation specifies. Also questionable is whether the entitlement fully settled the Tribe's Winters right to the San Juan River or whether, the Indians, are entitled to further water rights. Additionally, the federally constructed irrigation works for the project are more efficient than those contemplated by the legislation. Thus, over 100,000 acre-feet of water less than the legislatively quantified amount is necessary to irrigate the same amount of land. Various questions relating to the surplus have surface including what entity is entitled to the surplus and for which additional purposes (agriculatral, energy development, etc.) it may be used. [34]

A more definitive piece of legislation led to the settlement of the Ak Chin Indian Community's water rights.[35] The legislation was preceded by threats of litigation. It authorizes delivery of 85,000 acre-feet of water per year by contract to the Ak Chin Community and assures construction by the federal government of a delivery system and ground water pumping facilities on federal lands. Once the settlement is in effect and the tribe is provided with the prescribed water supplies, the tribe agrees to waive its assertions and future claims for additional Winters rights.

The Ak Chin settlement was precipitated by a situation where non-Indian farmers adjacent to the reservation were withdrawing ground water to the extent that the water level beneath the reservation was impacted. The proposed settlement involved importing water supplies to the reservation. Both the non-Indians adjacent to the reservation and the Indians had the objective of bringing new water to the area. With this mutual goal, the legislation was drawn up and enacted with local support, essentially placing on the federal government the responsibility to find a water supply for the reservation. After enactment of the legislation questions arose regarding the financial responsibility it placed on the United States. This has led to efforts to reach a final solution to the Ak Chin controversy through renegotiation of the original settlement.

The most recent reservation-specific settlement occurred for the Papago reservation. [36] Like the Ak Chin settlement, it was precipitated by litigation. In this instance the Tribe and the United States on behalf of the Tribe had filed claims against all water users in the upper Santa Cruz Basin. They claimed that the Papago's Winters rights had been violated by non-Indian uses.

Considerable negotiation took place in advance of introdction of a Papago settlement bill. Because of the law suit, all the major water users in the area had incentive to come to the bargaining table. Like the Ak Chin situation, the proposed solution involved the importation of a new water supply and the use of available municipal effluent. According to parties involved in the negotiations, had the proposed solution involved only use of limited local water supplies, little opportunity would have existed for unifying the parties.

The initial settlement which was negotiated and enacted by Congress was vetoed by the President. Regarding this veto, Interior Solicitor Coldiron has stated:

> In his veto message the President sent one loud and clear message. Indian tribes, states, cities and private parties cannot negotiate a settlement of their water rights differences and then present to the United States a bill for tens of millions of dollars where the United States has not participated in the negotiations and has not been responsible for injury to the Indians' water rights. 37/

The settlement was then renegotiated with less federal financial participation. The second version was also enacted by Congress and was signed into law by the President.

The settlement is viewed by some as a success in that it establishes in finality a water supply for a major portion of the Papago Reservation. However, from the perspective of the State of Arizona as a whole, the settlement is seen by others as making it more difficult to allocate limited water supplies in an already overdrafted basin. Additionally, some view the substantial guarantees of water to both the Papago and the

Ak Chin Indians as probably in excess of amounts which would have resulted from a comprehensive quantification of all Indian water rights in the state.

In addition to the reservation-specific legislation mentioned above, proposals have been offered for nationwide quantification of reserved water rights. None of the proposals has been enacted by Congress. Most of them have included two themes: (1) to subject the holders of reserved water rights to the systems and procedures of state water law, and (2) to require inventory and quantification of reserved water rights.

Recently, at least two major national proposals have been discussed with renewed interest. One has been sponsored by the Western Regional Council, a group of western business interests involved in natural resource development. It calls for an exhaustive study of Indian water rights aimed at providing a data base for the "informed and intelligent" quantification of the rights. After such quantification, the rights would be integrated into state systems of water law. The bill provides for compensation of "unexercisable" rights and would establish an Indian Water Projects Commission with the responsibility to finance Indian water projects to permit the beneficial use of quantified Indian water rights. 38/

The other recent major proposal, which has been endorsed by the Western Conference of the Council of State Governments, has been termed the Water Rights Coordination Act (WCRA). It would recognize Winters rights exercised before passage of the Act, but thereafter would establish an eight-year period within which Indians would have to exercise or lose their Winters rights. An exception would be provided where the Secretary of Interior, pursuant to a determination of the feasibility of future exercise, could issue a certificate of exerciseability, which would allow the right to continue in existence after eight years. Winters rights not exercised and not falling within this exception would be extinguished. The bill would provide payment for constitutionally compensable loss of Winters rights. Claims for such compensation would have to be filed within two years following the date of extinguishment. The WRCA also provides for settlement of non-Indian reserved water rights. 39/

Indian tribes have generally expressed disagreement with any proposal calling for comprehensive quantification of Winters rights. A recent position paper of the National Congress of American Indians entitled "Assertion of Indian Rights and Standards for Natural Resources and Trust Responsibilities" is reflective of this feeling. It reads, In part:

> At a tribe's request a moratorium shall be declared on all major agricultural, industrial or other projects using waters to which Indians have a claim under the Winters doctrine, and existing contracts shall be cancelled relating to such projects until such time as the Indian water rights

> have been specifically and acurately measured by Indians and allocated to Indian uses. Adequately funded irrigation projects primarily serving Indians shall be implemented immediately. Because each Indian Nation has unique water rights, plans, laws and needs, *each Indian Nation must set its own priorities and goals and must direct its own relationship with federal agencies, programs and policies. Recognizing that these are sovereign prerogatives and not matters for a single national Indian position, the National Congress of American Indians supports the water rights positions of each tribe, particularly the individual tribal positions regarding the National Water Policy and Principles and Standards developed under it, quantification of water usage and negotiations concerning future allocations of water...* (emphasis added) [40]

C. Negotiation

In addition to and most often in concert with litigation and legislation, negotiation has offered a third avenue for the settlemt of *Winters* claims. (It should be noted that "arbitration" has been mentioned as a fourth method of settlement.[41] Under this theory, "arbitration agencies" would be created under state or federal governments and would be empowered to seek settlements of Indian water right claims. In practice, this theory has progressed very little because of the feeling that it would simply add one more layer of decision making and that the courts would ultimately be called upon to review the decisions of the arbitration agencies.)

As noted above, extensive negotiations preceded the legislative determinations of the *Winters* claims of the Ak Chin and Papago Indian Communities. Other attempts to negotiate settlements are currently underway. President Reagan has recently stated, "I strongly believe that the most appropriate means of resolving Indian water rights disputes is through negotiated settlement and legislation, if it is needed to implement any such settlement."[42/] This feeling seems to be shared by the Secretary of Interior, his Solicitor, and various other officials in the present Administration. They have stressed that the United States must be an active party in any Winters settlements reached through negotiations. The Administration has appointed a federal negotiating team, called the Federal Water Policy Advisory Group, charged with seeking, wherever possible, negotiated settlements of Winters claims. The advisory group worked extensively on the Papago settlement, which has now been completely implemented. It is currently engaged in seeking final negotiated settlements for the Ak Chin, Escondido and Fort Peck Indian Communities. Further, according to a speech by William P. Horn, Deputy Under Secretary of the Department of Interior, four or five other tribes have contacted the advisory group and expressed an interest in negotiation while, the advisory group believes, other tribes will come forward to negotiate once successes through negotiation are seen. [43/]

While some settlement of Winters claims has been reached through negotiation, other attempted negotiated settlements have so far proven unsuccessful. In 1977 the Uintah and Ouray

Tribal Business Committee of the Ute Indian Tribe passed a resolution requesting the State of Utah to recognize certain tribal water rights. The State decided to evalute the Tribe's water right claims and formulate a negotiating position. A task force was formed for this purpose. The total acreage for which the Tribe claimed water rights was 129,201 acres, with 77,800 acres in irrigation and the remaining land proposed for irrigation. After approximately two years of negotiation between the State and the Tribe an agreement was reached concerning the extent of the Ute Indian water right claims. This agreement was submitted to the Utah Legislature, which voted to ratify the agreement, which is known as the Ute Indian Water Compact . Since that time, however, the Compact has been before the Tribe and Tribe has failed to act upon its ratification.

As noted above, notwithstanding some setbacks, many interested parties view negotiation as the best possible solution to the many questions involved in settling Indian water right claims. The State of Montana has taken a particular interest in this regard and has created the Montana Reserved Water Rights Compact Commission. This entity has been delegated the authority to negotiate on behalf of the state to seek settlement of reserved water rights claims with Indian tribes and federal agencies. Special exemptions from the state's new water rights law have been granted tribes who enter negotiations with the state. Thus far the Fort Peck, Fort Belknap, Northern Cheyenne, Crow, Rocky Boys and Turtle Mountain Tribes have expressed interest in negotiating with the Commission.

Also, the governors of the Western Governors' Policy Office have sent a formal resolution to the Secretary of Interior encouraging negotiated settlement as the preferred solution to conflicts between Indian water claims and non-Indian uses. Three other organizations joined in the resolution, namely, the Council of Energy Resource Tribes, the Native American Rights fund and the Western Regional Council.

VI. Effect of Unquantified Indian Water Rights

Water law in the West emphasizes stability and predictability among interrelated water rights. The "first in time - first in right" rule of prior appropriation law protects existing economies which are predicated upon established uses while at the same time insuring maximum beneficial water use as defined by the public. The reliability of the appropriation doctrine has, in large part, made the West a socially inhabitable and economically fruitful region.

The unquantified nature of the vast majority of the Indian water rights in the West creates substantial uncertainty with regard to the management of water resources and the administration of water rights and is of concern to state and federal governments and Indians and non-Indians alike.

Unquantified Winters rights make it difficult, and sometimes impossible, to implement legal and adminstrative systems on which the appropriation doctrine is based. Many states must hold applications for new water permits where the land or water resources involved are within or near Indian reservations until Indian water rights are determined as it is impossible for state officials to determine the availability of water for new appropriations. Also, construction of approved water projects can suffer significantly. For example, in Utah the Bonneville UPALCO and Unitah units of the Central Utah Project have been significantly delayed, with accompanying increases in cost, due to the inability of the states and the Indians to come to an agreement on the Ute Indian Water Compact. Delay in construction of the White River Dam is also partially attributable to the uncertainty caused by unquantified Indian water rights.

The lack of definition of Indian rights also adversely impacts the ability of the western states to properly carry out some water conservation and management programs. For example, Arizona has enacted legislation intended to remedy its ground water overdraft problem. However, the state will be hampered in its efforts to carry out the law if ground water pumping on the Indian reservations goes unchecked. The State of Washington's basin management program planning effort is designed to determine physical availability of waters, determine and subtract out the demands on the system under existing rights (which include Indian rights and minimum flows) and then determine, tentatively at least, the best use for the remaining water. Not knowing the quantity of Indian water rights precludes a good planning effort.

Tremendous federal resources, both time and money, are being expended litigating Indian water right claims, considering legislative proposals and preparing for and participating in negotiation proceedings. Considering successes so far, it is questionable whether present approaches can be considered cost effective. Moreover, there has been considerable controversy regarding the issue of compensation for both the potential loss of Indian water rights not yet quantified and non-Indian water rights which may be affected when Indian claims are quantified. The federal government is seen as the entity responsible for providing such compensation. Postponing the quantification of Indian water rights likely means increasing the amount of money which will be needed to meet any such obligation. The uncertainties of Indian water right entitlements also affects federal water planning. Without guaranteed water supplies to specific reservations or tribes, it is difficult for the federal government to invest in construction of Indian water projects, diversion works and/or irrigation facilities.

Indian tribes as well are in a poor position to finance development of water resources without quantified water rights, or to otherwise utilize tribal resources dependent on water supplies. Many observers argue that the piecemeal approach which has been used to quantify Indian water rights may eventually result in inequity in that those tribes which come forward early and seek quantification may receive awards in excess of what other tribes can possibly be granted in a comprehensive all-encompassing quantification. Additionally, unquantified Indian water rights cannot be protected by the traditional legal mechanisms which regulate vested water rights in the West.

The fact that Indian water claims are largely unquantified may represent a significant problem for many non-Indians as well. Non-Indians are using water pursuant to state granted water rights largely without knowledge of the potential extent of the Indian water rights. The early priority dates of Indian water rights means that when such rights are established they may displace state created water rights with later priorities. As Illustration I above demonstrates, this could mean substantial dislocation of non-Indian uses, since the vast majority of all available water in the West is in use, while very few Indian water rights have yet been quantified.

FOOTNOTES

1. *U.S. Water Resources Council*, *The Nation's Water Resources 1975-2000, The Second National Water Assessment*, Vol. 1, Summary 56-59 (Washington, D.C., GPO, December 1978)
2. R. Murray & B. Reeves. Estimated Use of Water in the United States in 1975, 8-9 (U.S. Geological Survey Circular - 765) (Arlington, Va, 1977)
3. 14 Stat. 262 (1866), 43 U.S.C. §661 (1970).
4. 19 Stat. 377 (1877), as amended 43 U.S.C. §322 (1970).
5. 295 U.S. 142 (1935).
6. *R. Dewsnup and D. Jensen*, *A Summary - Digest of State Water Laws* 1-72 (1973)
7. 207 U.S. 564 (1908).
8. 207 U.S. at 576.
9. S. Matheson, *Indian Reserved Water Rights: The Winters of Our Discontent*, 88 *Yale L.J.* 1689, 1695 note 40.
10. 104 F.2d 334 (9th Cir. 1939).
11. 131 F.2d 359 (1942).
12. *R. Foreman, Indian Water Rights; A Public Policy and Administrative Mess* 69 (1981).
13. 236 F.2d 321 (9th Cir.), *cert. denied*, 352 U.S. 988 (1956), *rev'd on other grounds*., 330 F.2d 897 (9th Cir. 1964), *cert. denied*., 381 U.S. 934 (1965).
14. 161 F. 829 (9th Cir. 1908).
15. 373 U.S. 456 (1963), decree at 376 U.S. 340 (1964).

FOOTNOTES

16. Arizona v. California, ___U.S.___, 103 S. Ct. 1382 (1983).

17. For example, these observers point to the Court's statement in Arizona v. California which reads:

> The States have already indicated, if the issue (the water rights decreed in *Arizona v. California* 376 U.S. 340 (1964)) were reopened, that the irrigable acreage standard itself should be reconsidered in light of our decisions in *United States v. New Mexico*, 328 U.S. 696 (1978) and *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*. 443 U.S. 658 (1979), *and we are not persuaded that a defensible line can be drawn between the reasons for reopening this litigation advanced by the Tribes and the United States on the one hand and the States on the other*. It would be counter to the interests of all parties to this case to open what may become a Pandora's Box, *upsetting the certainty of all aspects of the Decree*. (emphasis added.) 103 S. Ct. at 1395.

See also statements made by Justice White during the oral argument for the most recent *Arizona v. California* decision.

18. United States v. New Mexico, 438 U.S. 696 (1978).

19. Cappaert v. United States, 426 U.S. 128 (1976).

20. ___U.S.___, 103 S. Ct. 2906 (1983).

21. ___U.S.___, 103 S. Ct. 1382 (1983).

22. 460 F. Supp. 1320 (E.D. Wash. 1979) *reversed on reh'g* 647 F.2d 42 (1981). *cert. denied*, 102S. Ct. 657 (1982).

23. Nos. 80-3229 and 80-3245 - F.2d (9th Cir. Nov. 15, 1983).

24. Civil No. 4993 (District Court of the Fifth Judicial District State of Wyoming, May 10. 1983).

FOOTNOTES

25. *See* Papago Settlement reached through passage of the Southern Arizona Water Rights Settlement Act of 1982, P. L. 97-293. *Compare* Ahtanum Creek Settlement, *see* *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956) *cert. denied* 352 U.S. 988 (1957).
26. McCarran Amendment, 43 U.S.C. § 666.
27. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Arizona et al. v. San Carlos Apache Tribe, ___U.S.___, 103 S. Ct. 3201 (1983). *Cf.* Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979).
28. *See* Hurley v. Abbott, 259 F.Supp. 669 (D.Ariz 1966).
29. United States v. Orr Ditch Water Co., Equity No. A-3 (Orr Ditch) Final Decree 87.
30. ___U.S.___, 103 S Ct. 2906 (1983).
31. *Id.*
32. *See* Arizona v. California, ___U.S.___, 103 S. Ct. 1382, 1385-1388 (1983).
33. Address by William Coldiron, National Water Resources Association (July 30, 1983, Kalispell, Montana).
34. *J. Folk-Williams, What Indian Water Means to the West* 13 (1982).
35. Water Right Claims - Ak Chin Indian Community Act, P.L. 95-328 (1978).
36. Southern Arizona Water Rights Settlement Act, P.L. 97-293 (1983).
37. Address by William Coldiron, National Water Resources Association (July 30, 1983, Kalispell, Montana).

FOOTNOTES

38. *J. Folk-Williams, What Indian Water Means to the West* 17 (1982).

39. *Id.* 15-17. *See also* J. Little, *Administration of Federal Non-Indian Water Rights*, 27 *Rocky Mt. Min. L. Inst.* 1709, 1776-1777 (1982).

40. *Id.* 18.

41. Address by William Coldiron, National Water Resources Association (July 30, 1983, Kalispell, Montana).

42. As quoted in *Id.*

43. Address by William Horn, Deputy Under Secretary of Interior, Workshop on Recent Developments in Water Rights Law (November 21, 1983 San Diego, California).

(6/14/84)

Chemehuevi Indian Tribe
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CHEMEHUEVI INDIAN TRIBE

TESTIMONY

INDIAN RESERVED WATER RIGHTS

Irrigation has been a major goal of the Chemehuevi Indian Tribe for the development of tribal lands and in order to utilize our existing water rights.

We are completely dependent on the Colorado River for our water supply. Assurances of a water supply and development of an irrigation system will help the Chemehuevi Tribe to develop our lands, support our population, and to continue our economic growth.

Additional water was sought due to the failure of Federal Attorneys for the Tribe to include various parcels of irrigable lands in the original Arizona vs. California lawsuit. The Federal Government, in the original Arizona vs. California lawsuit, acknowledged that thousands of tribal acres had been omitted from the claims submitted by all five(5)tribes involved in that lawsuit.

The tribes have suffered due to the conflict of interest of the United States in representing not only the tribes, but numerous Federal water interests such as reclamation projects, that seek access to the same water.

The Arizona vs. California Supreme Court Decision proved beyond a shadow of a doubt that there is no balance between Indian rights and other interests. The Supreme Court ruled that it was too late to correct a twenty (20) year old mistake by the Federal Government that cheated five (5) Indian Tribes out of nearly a quarter of their rights to western irrigation water. Also, statements by Justice Byron R. White that "Tribes were not using their current water allocation", with no reflection as to WHY tribes are not using their water, is a poor excuse for denying tribes their rightful share of water.

The Secretary of the Interior has the authority under existing law to construct Indian Irrigation Projects and is required to defer the construction costs against the Indian lands benefited. There are many Acts of Congress dealing with rules and regulations on developing and maintaining Indian lands. However, what enters the picture is the amount of money appropriated for irrigation projects.

There are presently over 300+ separate irrigation developments on Indian Reservations. The sizes range from a few acres to over 100,000 acre projects. Minimal funding over a long period of time has affected construction progress of most projects, and much of the funding has to be directed towards rehabilitation or maintenance of those projects. At the present rate of funding received from the Bureau, it has been projected that it would require about 180 years to complete all projects based on estimates. Keep in mind that these are existing projects!

The Chemehuevi Indian Tribe has requested an irrigation system since the 1970's and have received little response and no funds. Clearly, the Bureau of Indian Affairs has failed to meet its treaty and trust responsibilities and legislative mandates by its failure to provide and complete the irrigation projects required by tribes in order to totally utilize their water rights.

Our rights are constantly being erroded by the actions of the Supreme Court of this country. Our needs for irrigation systems and economic development on our reservations go continually unmet by the Trustee representing the United States - the Bureau of Indian Affairs.

Every day we read of the skyrocketing costs of the Central Arizona Project. The New Waddell Dam of the CAP, as projected in 1990 dollars, would cost $627 million.

Today we are talking about Federal Responsibility to Indians involving water. It has been said that 'until the 1940's or 1950's, the Federal Indian policy vacillated from one of annihilation to assimilation, from subjugation to benign neglect'. The same holds true to a certain degree--where the Chemehuevi Indian Tribe is concerned, the Federal Government has not lived up to its trust responsibilities, nor has it given the financial and technical support needed in the area of water. Other tribes are in the same predicament.

Perspective on Ownership and Control of Indian Reserved Water Rights: NO ONE BUT INDIANS SHOULD CONTROL THEIR WATER RIGHTS.

Use and Management of the Resource: THE TRIBES HAVE THE CAPABILITY AND DESIRE TO FUNCTION IN THIS CAPACITY, GIVEN THE PROPER FINANCING AND TECHNICAL SUPPORT.

Proposed Solutions: INITIATE THE ACTION NECESSARY TO PUT INTO MOTION THE WHEELS WHICH WILL ALLOW THE LONG AWAITED IRRIGATION SYSTEM NEEDED TO DEVELOP THE CHEMEHUEVI INDIAN RESERVATION.

EACH TRIBE MUST EXPRESS ITS NEEDS, AND THE GOVERNMENT MUST LEARN TO DEAL WITH THE OFFICIAL REPRESENTATIVES OF INDIAN TRIBES ON A ONE-TO-ONE BASIS, RECOGNIZING THE 'GOVERNMENT-to-GOVERNMENT' RELATIONSHIP.

Respectfully submitted by:

CHEMEHUEVI INDIAN TRIBE

June 14, 1984
DATE

Richard Alvarez
Richard Alvarez, Chairman

THE NAVAJO NATION
WINDOW ROCK, NAVAJO NATION (ARIZONA) 86515

PETERSON ZAH
CHAIRMAN, NAVAJO TRIBAL COUNCIL

EDWARD T. BEGAY
VICE CHAIRMAN, NAVAJO TRIBAL COUNCIL

June 19, 1984

Senator Malcolm Wallop
United States Senate
Committee on Energy & Natural
  Resources
Washington, D.C. 20510

Dear Honorable Senator Wallop:

The Navajo Nation appreciates the opportunity to address the Subcommittee on Public Lands and Reserved Water of the Senate Committee on Energy and Natural Resources. We understand that the purpose of the workshop is to educate the committee members and we are glad to assist in that effort.

While the Navajo Nation appreciates the opportunity to address the Subcommittee, we feel compelled to raise our concerns about the workshop.

1. An educational effort such as this workshop is commendable, however, it should be made clear to all concerned that this Subcommittee has no jurisdiction over Indian water rights; discussions of Indian rights more appropriately belongs with the now permanent Senate Select Committee on Indian Affairs.

2. Indian organizations are not the appropriate parties to speak on behalf of Tribes. Only each individual Tribe can determine its approach to its water rights.

3. The subject of Indian water rights is most complex. There is a great diversity of tribal water rights concerns and the workshop time allotments of five minutes for twelve Indian participants cannot begin to address the multiplicity of issues and situations presently facing the 290 tribal governments. There is no single approach or solution to all Indian water issues.

4. For tribes to make informed decisions about their water rights; i.e., litigation, negotiation, water development projects, etc., they must have basic factual data to support the decision-making process. Informed decisions will require water related studies on ground and surface water hydrology, soils surveys, engineering and design, economic development planning, and other related subject areas. Congressional support is needed now for funds for tribes to carry out these activities.

5. The panel entitled "Federal Responsibilities to Indians Involving Water" does not anticipate an Indian viewpoint. We hope this is merely an oversight.

The Navajo Nation is presently engaged in water rights litigation in both New Mexico and Arizona. Therefore, the subject of Navajo water rights is not appropriate for discussion in this forum except perhaps in the most general manner.

The Navajo Nation and its 160,000 citizens are presently using water for domestic use; agriculture, both farming and lviestock uses; recreational uses; and municipal and industrial uses. We anticipate and are currently planning for continued and increased water usages in the future. It is our intent to create a viable and economically sound permanent homeland for Navajo people. To accomplish this end we will need and intend to use the water to which we are legally entitled.

We would like to pose some questions to the Subcommittee and would like to request that the responses be in writing. 1. What is the purpose of this workshop? 2. Does the Subcommittee intend to assert jurisdiction over Indian water rights issues, and if so, how does the Subcommittee differentiate its role from the role of the Senate Select Committee on Indian Affairs? 3. Will the Subcommittee support funding for tribes to carry out studies so these issues can be addressed in an informed manner? 4. Specifically, will the Subcommittee support the Navajo Nation requests for funding? 5. What are the standards the United States uses in determining the approach taken in litigation or negotiations when there is a conflict between the U.S. interests and tribal interests, or when there is a conflict between Tribes? 6. How will the Interior Department represent BLM, Bureau of Reclamation or other federal entities and still adequately represent Tribes? 7. Given the problems the Papago Tribe is having in implementation of their settlement, what assurances can or will be given by the U.S. to those Tribes who negotiate water settlements that the settlements will be honored in the future? 8. Will the Congress and this Subcommittee support the Tribes in their regulatory authority over waters on their lands and in this regard, when will the Department of Interior begin to approve water codes for Tribes?

Finally, we are requesting from the Subcommittee a transcript of the workshop. Additionally, we request that the record be kept open for at least sixty days to afford the Navajo Nation an opportunity to respond to the discussions at the workshop. To this end, we would like for the transcript to be made available as sooon as possible.

Thank you again for the opportunity to address the Subcommittee on these issues of vital importance to Indian people.

Sincerely,

Peterson Zah, Chairman
Navajo Tribal Council